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CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

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CASES REPORTED IN FEDERAL SUPPLEMENT

CUSTOMS

(C.D. 4666)

SCHMIDT, PRITCHARD & CO., INC.
FERROQUIP CORP.
v.
UNITED STATES

Cross-motions for summary judgment

Court No. 67/77399

Port of New York

[Judgment for plaintiffs.]

(Decided August 5, 1976)

Barnes, Richardson & Colburn (*Richard C. King* of counsel) for the plaintiffs.
Rex E. Lee, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

NEWMAN, Judge: In this protest, the parties agree there is no genuine issue as to any material fact, and have filed cross-motions for summary judgment pursuant to rule 8.2.

For the reasons stated herein, plaintiffs' motion is granted.

The issue for determination concerns the proper tariff classification for certain wire rod coiling equipment [1] imported from West Germany in 1965 through the port of New York. Duty was assessed at the rate of 15 per centum ad valorem pursuant to the provision in item 674.35, TSUS, for "Other" metal-working machine tools. Plaintiffs claim that the proper rate of duty is 10 per centum ad valorem pursuant to the provision in item 678.50, TSUS, for machines not specially provided for, and parts thereof.

[1] The subject merchandise is invoiced as "Combination Garrett/Edenborn Reels".

STATUTES INVOLVED

Tariff Schedules of the United States, 19 USC 1202:

SCHEDULE 6. – METALS AND METAL PRODUCTS

* * * * * * *

PART 4. – MACHINERY AND MACHINERY EQUIPMENT

* * * * * * *

Subpart F. – Machines for Working Metal, Stone, and Other Materials

Subpart F headnotes:

1. For the purposes of this subpart—
(a) the term "machine tool" means any machine used for shaping or surface-working—
(i) metals (including metallic carbides);

* * * * * * *

whether by cutting away or otherwise removing the material or by changing its shape or form without removing any of it, but does not include rolling mills (item 674.20) or the hand-directed or -controlled tools provided for in items 674.60 and 674.70 of this subpart and in item 683.20 of part 5 of this schedule;

* * * * * * *

	Machine tools:	
	Metal-working machine tools:	
	* * * * * * *	
674.35	Other	15% ad val.
	* * * * * * *	
	Subpart H. – Other Machines	
	* * * * * * *	
678.50	Machines not specially provided for, and parts thereof	10% ad val.

THE FACTS

Each party has submitted an affidavit in support of its respective motion: plaintiffs' affidavit was executed by Eric R. Bachmann, president of Ferroquip Corporation; defendant's affidavit was executed by Charles S. Mercer, a vice president of the Morgan Construction Company, Worcester, Massachusetts.

The parties agree, and I find, there is no genuine issue of fact to be tried. The pertinent facts are:

Wire rods and bars are produced by a hot-rolling mill in many thousands of linear feet. According to Mercer's affidavit, the smaller diameter wire rods arrive at the end of the hot-rolling mill at speeds of up to 12,000 feet per minute, while the larger diameter wire bars arrive at the end of the rolling mill at speeds of up to 4,000 feet per

minute. It is obvious, then, that unless these wire rods and bars, which may be thousands of feet in length, are coiled or reeled they would be utterly impossible to handle. This fact is clear from the following description of "rod reels" in United States Steel Corporation's publication *The Making, Shaping and Treating of Steel* (8th ed., 1964), page 781:

> *Rod Reels*—The daily output of rod mills in use today varies from 450 to 1500 net tons, which tonnages, translated into linear units of No. 5 rod, are equivalent to about 1500 and 5000 *miles*, respectively. From this statement it is evident that this enormous output would have been impossible without adequate reeling facilities. As previously pointed out, this need caused the early adoption of automatic reels, the first practical development of which was introduced about 1880. The rod reels now in use are mainly of two types, known as the *pouring reel* and the *laying reel*. * * * [Emphasis added in part.]

The imported merchandise consists of "pouring and laying reels", which are machines used at the end of the steel hot-rolling mills to coil or reel wire rods and bars. When the rods and bars reach the coiling machines, they "are sufficiently rigid as to require some force or energy to put them into the shape of a coil" (Mercer's affidavit, page 3). The coiling operation, however, does not change the cross section, dimensions or physical properties of the rods and bars, and does not advance or improve them for their intended use. Wire rods and bars, generally, are considered as semifinished products intended primarily to be drawn into wire.

Wire rods and bars produced by a hot-rolling mill must be allowed to cool before being further processed into wire, and the coiling of said rods and bars allows this cooling to occur. Wire rods and bars, when in coil form, are often subjected to further processing such as acid dipping, washing, drying and coating with lubricants before being drawn into wire.

Issue Presented

There is no dispute that the pouring and laying reels are "machines", and the sole issue is whether they are specially provided for as "metal-working machine tools" within the purview of item 674.35, TSUS.

Opinion

Headnote 1, subpart F, part 4, schedule 6 defines a "machine tool" as "any machine used for shaping or surface-working * * * metals * * * whether by cutting away or otherwise removing the material or by changing its shape or form without removing any of it * * *".

It is fundamental, of course, that it is the duty of the court to interpret statutes to reflect Congressional intent. *United States* v. *S. H. Kress & Co.*, 46 CCPA 135, C.A.D. 716 (1959). The crucial question here is whether Congress intended that a machine used for coiling wire rods and bars should be treated as a machine used for "shaping" metals.

Plaintiffs contend that to be classifiable as a metal-working machine tool (viz., machine used for "shaping" metals) a machine must perform an operation upon metal to improve or advance its status for further use, citing *United States* v. *Kurt Orban Co., Inc.*, 47 CCPA 28, C.A.D. 724 (1959), *aff'g* 41 Cust. Ct. 190, C.D. 2041 (1958); and that the pouring and laying reels do not meet that criterion.

Defendant emphasizes that portion of headnote 1 reading "by changing its shape or form without removing any of it", and insists that, since the coiling operation changes the shape or form of the straight wire rods or bars into coils, the pouring and laying reels are within the purview of the definition.

There can be no doubt that by changing the straight wire rods and bars into coils the pouring and laying reels literally change the shape or form of the rods and bars. In essence, the dispute between the parties revolves about whether the language in headnote 1 relied upon by defendant should be given its literal meaning.

In *Kurt Orban*, a scrap baler which compressed voluminous metal scrap into smaller bundles and sheared off excess metal was held not classifiable under paragraph 372 of the Tariff Act of 1930 as a machine tool, since the baler did not "work" on metal in the sense intended by Congress.[2] The majority of the Court of Customs and Patent Appeals agreed with the Customs Court "that the primary function of * * * [machine tools] was to perform an operation upon metal in order to improve and advance its status for further use", whereas "the primary function of the * * * baler is merely that of compressing scrap metal into such form that it becomes more readily available for handling and transportation". In considering the application of the term "work" in the 1930 statutory definition of "machine tool" under paragraph 372, the majority of the appellate court observed (47 CCPA at 30–31):

> The word "work" is susceptible of such a wide variety of meaning that we have grave doubts Congress intended it to be construed as broadly as the Government urges. For example, in a broad sense any tool which changes the shape, size, or even the position of a piece of metal in any manner and for any purpose may be literally said to do "work" on it, even though the nature of that particular "work" be wholly incidental to the

[2] The definition of "machine tool" under paragraph 372 of the Tariff Act of 1930 covered "any machine operating other than by hand power which employs a tool for work on metal".

> primary function of the device. Under such circumstances there is a substantial doubt in our mind that Congress intended that word to be given such a broad construction, and we think it proper to resolve that doubt in favor of the importer. * * *

Following the rationale of *Kurt Orban*, the Customs Court held that machines for straightening crooked or bent round pipes or tubes were properly dutiable under paragraph 372 as machine tools rather than as machines not specially provided for, where the operation of the tube straightener "might be well described as 'an operation upon metal in order to improve and advance its status for further use'". *Mannesmann-Meer, Inc.* v. *United States*, 55 Cust. Ct. 1, 5, C.D. 2546 (1965).

The undisputed facts herein disclose that the wire rods and bars from the hot-rolling mills are semifinished products, and the coiling thereof does not advance them toward their intended use. The rods and bars after coiling are usually drawn into wire, and the drawing process negates the coiling operation. Moreover, coiling, while literally producing a "change" in the shape or form of the straight wire rod or bar, does not alter its cross section, dimensions or mechanical properties.[3] Plainly, the language "*changing* its shape or form" (emphasis added) in headnote 1 was intended to apply to changes which involve some fabrication, improvement or advancement of metal toward its intended use. Here, the function of the pouring and laying reels involves no fabrication, improvement or advancement of the rods or bars into wire or any other product. In view of the meaning long ascribed to the term "machine tool" under prior tariff acts, it is extremely remote that by the phrase in headnote 1 "changing its shape or form" Congress intended to include "any [machine] which changes the shape, size, or even the position of a piece of metal in any manner and for any purpose". *Cf. Kurt Orban*, 47 CCPA at 30.

In *General Methods Corp.* v. *United States*, 59 CCPA 109, 112, C.A.D. 1049, 458 F. 2d 521 (1972), the Court of Customs and Patent Appeals, citing *United States* v. *Andrew Fisher Cycle Co., Inc.*, 57 CCPA 102, 107, 426 F. 2d 1308, 1311–12, C.A.D. 986 (1970), pointed out that "[t]ariff provisions do not necessarily include everything that falls within their literal meaning"; but the court admonished that "the basis for avoiding the literal interpretation of a provision must be clearly established". In the present case, as in *Kurt Orban*, where a literal interpretation would clearly defeat Congressional intent, a sound basis exists for eschewing a literal construction.

Defendant argues that the rationale of *Kurt Orban* is no longer viable under the broadened definition of "machine tool" in headnote 1.

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[3] The pouring and laying reels are somewhat analogous to wire spooling machinery, which the Government concededly does not classify under item 674.35. See T.D. 67–186(9).

I find this contention untenable. Although it is true that in the Tariff Schedules of the United States Congress broadened the definition of "machine tool" insofar as it now includes machines that work on materials other than metal,[4] the legislative history of the headnote suggests that there was no intent to reject the rationale of *Kurt Orban*. Thus, at the hearings before the Tariff Commission (now called the International Trade Commission) on schedule 6, the Customs Court's decision in *Kurt Orban* (erroneously referred to in the *Tariff Classification Study* as *Curt Arvin*) was *specifically* called to the attention of the Commission by one of the witnesses who opined that under headnote 1 a scrap baler would be held to be a machine tool. The witness urged that the existing definition of machine tool in the Tariff Act of 1930 be retained, observing that "[w]ork on metal is well understood to mean fabrication and not mere haphazard cutting". Mr. Russell N. Shewmaker, Assistant General Counsel for the Commission, replied that "we do not contemplate when we speak of a machine used for shaping or surface work that we would be treating with anything such as a scrap baler". *Tariff Classification Study* (November 15, 1960), schedule 6, pages 648–649.

Moreover, in *Pitney-Bowes, Inc.* v. *United States*, 59 Cust. Ct. 181, C.D. 3116 (1967), the Customs Court in declining to give a literal interpretation to the TSUS definition of "machine tool" in headnote 1, stressed the legislative history of headnote 1, and the judicial construction of the term "machine tool" under the 1930 and previous tariff acts. The court held that embossing machines used to impress letters or other characters into a metal plate, so that one surface has slight protuberances and the other surface has slight depressions, did not perform the kind of change in shape or form contemplated by Congress to bring a machine within the definition in headnote 1.

Additionally, both parties have cited *Broderick & Bascom Rope Co.* v. *United States*, 65 Cust. Ct. 400, C.D. 4112 (1970). There, the Customs Court held that item 674.35, TSUS, was applicable to a wire strander, which twists or bends a multiple number of wires into strands for making wire ropes, but does not remove any of the wire or change the dimensions of the individual wires. In *Broderick & Bascom*, the Court of Customs and Patent Appeals, 59 CCPA 130, C.A.D. 1053, 460 F.2d 1070 (1972), without deciding whether the stranders were

---

[4] The *Tariff Classification Study* (November 15, 1960), schedule 6, page 271 states:

> Headnote 1 defines the term "machine tool" more broadly than it is defined in the present provisions of paragraph 372 where it is defined as "any machine operating by other than hand power which employs a tool for work on metal". Under the proposed definition, the term would apply not only to metal-working tools but also to machines used for shaping or surface-working stone, ceramics, concrete, asbestos, cement, and like mineral materials, glass in the cold, wood, cork, bone, hard rubber or plastics, or other hard materials. These latter machine tools are significant articles of trade and it is desirable to have a separate provision therefor in the proposed schedules.

classifiable as machine tools under item 674.35,[5] reversed on the ground that the stranders were more specifically provided for as cordage machines under item 670.90 of the Tariff Schedules of the United States.

It should be noted that the stranders fabricated and advanced multiple individual wires into "strands" for use in making wire ropes, whereas here, after the coiling operation of the pouring and laying reels, wire rods and bars still remain only wire rods and bars. Hence, the function of the wire strander is not analogous to that of the pouring and laying reels.

In summary, the pouring and laying reels are not machines used for shaping or surface-working, and do not change the shape or form of metal within the meaning of headnote 1 as contemplated by Congress. Accordingly, I conclude that the imported machines are not classifiable as machine tools under item 674.35, but are properly dutiable as machines not specially provided for under item 678.50. Plaintiffs, therefore, are entitled to summary judgment, and judgment will be entered accordingly.

(C.D. 4667)

INTER-MARITIME FORWARDING CO., INC. *v.* UNITED STATES

Electrical articles

Court Nos. 66/60107, etc.

Port of New York

[Judgment for defendant.]

(Decided August 12, 1976)

Allerton deC. Tompkins for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

FORD, Judge: In this consolidated action, both parties have moved for summary judgment under Rule 8.2, Rules of the United States Customs Court. The merchandise under consideration was described on the invoices as connectors, sockets, socket contacts, pin contacts, socket inserts, mountings, brackets, and mounting brackets with or

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[5] The appellate court commented (59 CCPA at 134): "If the present wire stranders do fall within the description of the provision for machine tools, it must be because a broad interpretation is given to the terms 'shaping or surface-working' and 'by changing its shape and form without removing any of it' in the Schedule 6, Part 4, Subpart F headnote."

without additional words of description. A catalog of the actual importer depicts the various articles on pages 31–34 which the affiant, Jacob Friedland, has circled and initialed "JF" as per his affidavit, paragraph 4, attached to plaintiff's motion for summary judgment.

The merchandise was classified under item 685.90, Tariff Schedules of the United States, or as modified by T.D. 68–9, which provides as follows:

> Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof.

Since the articles are designed and used in audio circuits plaintiff contends they are not provided for in item 685.90, Tariff Schedules of the United States, citing *Midland International Corp.* v. *United States*, 62 Cust. Ct. 164, C.D. 3715, 295 F. Supp. 1101 (1969); *General Electric Company* v. *United States*, 63 Cust. Ct. 140, C.D. 3887 (1969), *aff'd*, 58 CCPA 152, C.A.D. 1021, 441 F. 2d 1186 (1971); *Rembrandt Electronics, Inc.* v. *United States*, 75 Cust. Ct. 103, C.D. 4613, 405 F. Supp. 588 (1975) (*appeal pending*). Accordingly, plaintiff claims the proper classification for such articles is provided for in item 688.40, Tariff Schedules of the United States, or as modified by T.D. 68–9, which reads as follows:

> Electrical articles, and electrical parts of articles, not specially provided for.

The evidence supporting plaintiff's motion for summary judgment consists of an affidavit of Jacob Friedland, vice president of the actual importer, a catalog of the actual importer depicting the imported articles, and interrogatories obtained pursuant to rule 6.3 of the rules of this court which were answered by Mr. Friedland.

At the outset, I note the classification of the involved merchandise was made under item 685.90, Tariff Schedules of the United States, which covers 15 types of items all carrying the same rate of duty. Under such circumstances, where a specific classification is not made, no presumption of correctness attaches to the classification. *Broadway-Hale Stores, Inc.* v. *United States*, 63 Cust. Ct. 194, C.D. 3896 (1969) and cases cited therein. It is, however, incumbent upon plaintiff to establish the correctness of its claim.

Item 688.40, *supra*, under which plaintiff claims, is a basket provision for electrical articles and it contains a "not specially provided for" clause. The imported items of merchandise are in fact electrical

articles. However, they are also or at least some of them are "receptacles" or "plugs" and all of them are articles "for making connections to or in electrical circuits." Whether they are receptacles, plugs or articles for making connections to or in electrical circuits is immaterial if they are designed for use in audio circuits under the principles set forth in the *Midland* and *General Electric* cases, *supra*. However, if they are capable of use in power circuits then item 685.90, *supra*, which does not contain a "not specially provided for" clause is more specific and must prevail.

The affidavit and interrogatories insofar as are pertinent to this decision establish the imported articles to be rated at 15 amperes and 200 volts. The catalog attached to plaintiff's motion also confirms this fact. While the court may take judicial notice of the fact that these ratings are equivalent to power function, it does not *ipso facto* establish them as such. It is conceivable that for some audio functions such ratings would be necessary or desirable. The use of the articles according to Friedland is for audio use. There is no testimony to dispute this. In the interrogatories Mr. Friedland indicated that a power use would be dangerous as the cases of the imported articles are metal and are not insulated. A review of the catalog prepared under the direction of Mr. Friedland indicates that all of the plugs involved have nylon insulators and many of the receptacles are also insulated.

Based upon the facts before me the court concludes that the imported merchandise is more specifically provided for under item 685.90, *supra*, because of the high ratings, 15 amperes and 200 volts, and the evidence adduced establishing insulation of the articles.

The motion of plaintiff for summary judgment is therefore denied and defendant's cross-motion for summary judgment is granted.

Judgment will be entered accordingly.

(C.D. 4668)

NORMAN G. JENSEN, INC. *v.* UNITED STATES

Optical instruments—Gunsights

In issue are tubular gunsights, each of which consists of an outer steel protective body and an inner tapered aluminum tube at one end of which is a glass lens and at the other an aperture and light-collecting system. This light-collecting system is a red plastic piece of material, specially designed to gather and transmit all red rays and provides the aperture with intensive even red light in the form of a red dot. The sights which are mounted on rifles and shotguns are designed to be used in the following way: Both

eyes are kept open. With the left eye concentrating on the target and the right eye looking at the sighting device, the shooter sees the red dot at infinity on the target. Then, when the red dot is on the target, the shooter pulls the trigger. *Held:* The imported gunsights were properly classified as "optical instruments" under item 708.89 of the Tariff Schedules of the United States.

OPTICAL INSTRUMENTS—DEFINITION

Under schedule 7, part 2, headnote 3 of the tariff schedules, an article is classifiable as an "optical instrument" if it incorporates one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

Court No. 71-12-02025

Port of Minneapolis-St. Paul

[Judgment for defendant.]

(Decided August 12, 1976)

Barnes, Richardson & Colburn (*Peter J. Fitch* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Max F. Schutzman*, trial attorney), for the defendant.

MALETZ, Judge: This case involves the proper tariff classification of gunsights that were manufactured in and exported from Great Britain and entered at Minneapolis-St. Paul, Minnesota on August 13, 1970 and September 22, 1970. Plaintiff Jensen was the customs broker and the consignee was Normark Corporation of Minneapolis.

The gunsights in question were classified by the government under item 708.89 of the Tariff Schedules of the United States, as modified by T.D. 68-9, as other optical appliances and instruments and assessed duty at the rate of 31 percent ad valorem.

Plaintiff claims (1) that the gunsights designated as F/A 010 on the invoices should properly have been classified as other parts of rifles under item 730.67 of the tariff schedules, as modified by T.D. 68-9, dutiable at the rate of 12.5 percent ad valorem and (2) that the gunsights designated as F/A 012 should properly have been classified under item 730.75, as modified by T.D. 68-9, as other parts of shotguns, dutiable at the rate of 8 percent ad valorem.

The pertinent provisions of the tariff schedules read as follows:

Classified under:

Schedule 7, part 2, headnote 3:

3. The term "optical instruments", as used in this part, embraces only instruments which incorporate one or more optical

elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

* * * * * * *

Optical appliances and instruments not provided for elsewhere in part 2 of this schedule; frames and mountings for such articles, and parts of such frames and mountings:

* * * * * * *

708.89 Other appliances and instruments--- 31% ad val.

Claimed under:

Pistols, revolvers, rifles, shotguns, and combination shotguns and rifles, all the foregoing which are firearms designed to fire shot, pellets, or bullets * * *:

* * * * * * *

Rifles:

* * * * * * *

Shotguns:

* * * * * * *

Parts of the foregoing firearms * * *:

* * * * * * *

Rifle parts:

* * * * * * *

730.67 Other---------- 12.5% ad val.

Shotgun parts:

* * * * * * *

730.75 Other---------- 8% ad val.

Against this background, the major question in controversy is whether the imported gunsights are optical appliances or instruments.

I

The gunsights in issue are tubular in shape and about 6½ inches in length. Each sight basically consists of two assemblies: An outer steel body or cover and an inner collimator. [1] The collimator consists of a tapered aluminum tube at one end of which is a biconvex glass lens [2] approximately 1 inch in diameter which is held in a ring type

[1] A collimator is a device for producing a beam of parallel rays of light. See, e.g., *Engis Equipment Co. v. United States*, 62 Cust. Ct. 29, 31, 294 F. Supp. 964, 966, C.D. 3670 (1969). See also defendant's exhibit A, p. 15. This exhibit is a booklet which bears the signatures of two officials of the consignee Normark Corporation and, during the period in issue, was included by Normark in each box that contained a gunsight it sold. This booklet (hereafter referred to as the "Normark booklet") describes the "principles and how to use" the gunsights in question.

[2] A biconvex lens is one in which both of the surfaces curve outward as a result of which the lens is thicker in the middle and thinner at the edges. See R. 142.

fitting. At the forward end of the inner tube is an aperture and a light-collecting system. This light-collecting system is a red plastic piece of material, specially designed to gather and transmit all red rays and provides the aperture with intensive even red light in the form of a red dot.

The outer steel body performs primarily a protective function and is fitted with a form of mounting. At approximately the center of the outer body are two spring adjustment screws for adjusting the gun-sight to the user's personal vision and the trajectory of the gun. Also attached to the outer body is an unbreakable plastic dome which protects the light-collecting system.

The sights in question are intended for a specific type of hunting, namely close-range shooting on fast-moving targets. More particularly, the F/A 010 sight is designed to be mounted on rifles and is intended for use on a fast-moving target located at a distance of 100 to 150 yards, while the F/A 012 sight is designed for shotguns and intended for use on targets about 40 yards away.

In order to use the sight, the shooter, after putting the rifle to his shoulder, keeps both eyes open and concentrates on a particular target. The right eye (assuming that the shooter is right-handed) sees the light point in the gunsight which is in the shape of a red dot and the left eye sees the target. If the left eye is closed, then the only thing visible is the black tunnel of the sight with a red dot in it. If the right eye is closed, the only thing visible is the side of the sight of the weapon and the target.

When a shooter uses the imported sight, he does not look into it but rather looks at it and at the same time that he is looking at the sight both his eyes are concentrating on the target. In order for the shooter to use the sight without being injured by the recoil of the rifle, it is necessary to have his eye approximately 3 to 5 inches away from the edge of the sight. Additionally, if the eye is placed flush against the sight, the shooter's aim would be less effective because he would lose the peripheral vision around the sight. In other words, by keeping the sight from 3 to 5 inches from his eye, the shooter sees with that eye the red dot as well as the periphery of the target area.

The principle upon which the sight works is to take advantage of the normal binocular vision of humans [3] by fusing the image of the aiming spot with the image of the target, i.e., the image of the target perceived by the nonsighting eye is fused, by operation of the cortex in one's brain, with the peripheral image of the target and aiming spot perceived by the sighting eye. Stated otherwise, one eye sees the target and the surrounding area of the target while the other eye has

[3] Binocular vision is vision employing both eyes at once. See *Webster's New International Dictionary* (1948). The gunsights in issue will not work if a person has only one eye.

a portion of the target blocked out by the presence of the sight. Thus, both eyes are looking at the target and the sight blocks out a part of the target on one eye and represents an image of an aiming spot. Since the other eye is viewing the target, an image is transferred to the cortex of the brain. Thus, the shooter sees the image of an aiming spot as being part of the nonoccluded image.

Various excerpts from the Normark booklet are helpful in enabling one to understand how the sights in issue are used. Thus, page 8 of the booklet states in part that—

> * * * It is extremely important that the sight be zeroed in to the individual's eyes. The reason for this is that you are not sighting with one eye, and the effects of sight alignment with two eyes can vary considerably between shooters. There is one difference from sighting a normal telescope or open-type sight, and that is not to try to hold the [red] dot on the target for any length of time. With your left eye focusing on the target (for right-handed shooters), when the [red] dot lines up, pull the trigger.

Also helpful is the following comment at page 10 of the Normark booklet:

> First practice raising the gun quickly so that the 'light point' [red dot] is immediately seen. * * * Using two eyes, FOCUS on your target, mount the gun quickly, DIRECT the 'light point' [red dot] on your target, and squeeze the trigger.

II

As stated previously, the imported sights were classified under item 708.89 as other optical appliances and instruments. Also, as stated previously, headnote 3 of part 2, schedule 7 of the tariff schedules defines "optical instruments" as "instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose." Viewed against this statutory definition, it must be concluded that if an imported article consists of one or more optical elements the purpose of which is not subsidiary with regard to the operation of that article, then it is properly classifiable as an "optical instrument" under the tariff schedules. See *Amaco, Inc.* v. *United States*, 74 Cust. Ct. 172, 179, C.D. 4602 (1975). See also *Librascope Div. of Singer-General Precision, Inc.* v. *United States*, 76 Cust. Ct.197, C.D. 4656 (1976). Thus the two key problems before us are (1) whether the sights incorporate one or more optical instruments, and (2) whether the optical elements perform a dominant or primary purpose. For the reasons that follow, it is

held that the sights in question meet these criteria and were therefore correctly classified as optical instruments.[4]

At the outset, it is to be noted that the term "optical elements" includes lenses, prisms and mirrors. See, e.g., *Summary of Tariff Information* (1929), p. 552; *Engis Equipment Co.* v. *United States*, *supra*, 62 Cust. Ct. at 32. Further, the superior heading to items 708.01 through 708.29 of the tariff schedules provides for classification of "[l]enses, prisms, mirrors, and other optical elements * * *." Also, the term "optical," as used in tariff nomenclature, has been judicially construed to relate to the phenomena of both light and vision. See, e.g., *United States* v. *Bliss & Co.*, 6 Ct. Cust. Appls. 433, 440, T.D. 35980 (1915); *G.A.F. Corp. et al.* v. *United States*, 67 Cust. Ct. 167, C.D. 4269 (1971). Accordingly, an "optical element" for tariff purposes consists of lenses, prisms, mirrors, or other articles which depend for their operation on the phenomena of light and vision.

In this context, the record is clear that the sights in question incorporate two optical elements, namely, the lens and the red translucent plastic object on the forward end of the sights. That a biconvex lens is present in the articles at bar is unquestioned. In addition, it is apparent from the Normark booklet (pp. 4–6) that the lens is one of the key elements of the sight.

With regard to the red plastic translucent object on the forward end of the sights, it, too, is an optical element in that it is specially designed to gather light rays and then bend and convey those light rays through a small aperture in the direction of the lens. Thus plaintiff's witness Nils Ruder, the inventor of the imported sights and the

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[4] The *Tariff Classification Study*, Schedule 7 (1960), p. 140, states that headnote 3, part 2, schedule 7 "includes a definition of the term 'optical instruments' * * * [which] [i]t is believed * * * substantially conforms with existing customs practice." Relying upon this headnote, the court in *Parsons Optical Laboratories et al.* v. *United States*, 68 Cust. Ct. 143, 146–47, C.D. 4351 (1972) concluded that the criteria under the Tariff Act of 1930 for determining whether an article was an "optical instrument" were applicable in ascertaining whether the article was an "optical instrument" under the tariff schedules. These criteria under the Tariff Act of 1930 were stated by the court as follows in *Engis Equipment Co.* v. *United States*, 62 Cust. Ct. 29, 32, 294 F. Supp. 964, 966–67, C.D. 3670 (1969): (1) The device must function in such manner that employment of its optical features is dominant or primary, as compared to the role of its other components; (2) The device's optical elements must be essential to its operation; that is, to be considered an optical instrument, the device cannot be operated in its intended manner without the optical components; (3) The instrument must, in performing its intended function, act upon, deal with, or route rays of light; (4) The optical system of the instrument must aid human vision or create for inspection a picture or image of some object.

In *Parsons* the court found that an applanation tonometer—which is an instrument designed to measure the intraocular pressure of the eye by means of a "doubling" prism—met the foregoing criteria and hence was properly classified by the government as an optical opthalmic instrument. Parenthetically, it may be added that an applanation tonometer is *a fortiori* an "optical instrument" under the headnote 3 definition.

The point to all this is that upon further consideration of headnote 3, and in light of the decision of this court in *Amaco*, it is concluded that the criteria under the Tariff Act of 1930 as set out in *Engis* are not controlling in ascertaining whether or not an article is an optical instrument under the tariff schedules. Rather, it is concluded that the controlling definition under the tariff schedules is that set forth in headnote 3. Withal, as discussed below, the present record not only supports the classification of the present gunsights as "optical instruments" within the headnote 3 definition, but also supports their classification as "optical instruments" within the *Engis* criteria.

managing director of Singlepoint, Ltd., the manufacturer of the sights, testified (R. 97–98):

> Q. Mr. Ruder, what function does the red plastic in the sight * * * have?
> A. It only colors the aiming dot.
> Q. It colors—?
> A. It colors the light, the aiming dot.
> Q. *Does it, in fact, play a light-gathering function?*
> A. *Partly, yes.* [Emphasis added.]

With further reference to this red plastic object, defendant's witness, Richard Mastrom, a senior optical engineer employed by Honeywell, Inc. in the development of optical systems engineering, testified (R. 167):

> Q. Now, I direct your attention to the piece of red plastic, the red plug at the end of Plaintiff's Exhibit 1 [one of the sights in question]. And, do you have an opinion, Mr. Mastrom, with regard to whether or not that red plastic object performs any function with respect to this article?
> A. Yes, I believe it performs two functions.
> Q. Could you please elaborate?
> A. One, it's acting like an optical filter that is absorbing all of the light transmitted through it except for the rays in the area of the red portion of the visible spectrum and it is so shaped so as to direct light from the bright areas of the sky to the aperture in the sight itself.
> Q. Consequently, would you therefore state that the red plastic object performs an optical function with respect to the * * * sight?
> A. Yes, I would.

Further, page 6 of the Normark booklet states in part:

> The * * * sight consists of two assemblies: The collimator and the outer body. The collimator consists of a tapered tube, at one end of which is a lens, and at the other end an aperture and *light-collecting system.* * * * The light-collecting system is an acrylic, *specially designed to gather and transmit* all red rays which provides the aperture with intensive even red light. [Emphasis added.]

In a similar vein, page 14 of the Normark booklet characterizes the red translucent plastic object as a "high intensity light-gathering device."

On a related aspect, the court notes that plaintiff's witness Ruder testified that the red translucent plastic object is not a prism (R. 83–84, 217). However, it must be concluded that the object functions in a manner similar to a prism since (as testified to by defendant's witness Mastrom) it operates to refract light obtained from the bright

portions of the sky. In this connection, *Webster's Third New International Dictionary* (1963) defines the term "prism" as follows:

> 2a: a transparent body bounded in part by two plane faces that are not parallel used to deviate or disperse a beam of light * * * c: something that refracts light or produces an effect suggestive of a spectrum;

As previously observed, the evidence shows that the red plastic object gathers and transmits rays of light toward the lens. Also, visual inspection of the object indicates that it is "bounded in part by two plane faces that are not parallel."

In view of the foregoing, it is evident that the imported sights incorporate two optical elements—the lens and the red translucent plastic object. Whether the latter be termed a prism or not, it is nevertheless an optical element, inasmuch as it is directly related to the phenomena of light and vision, i.e., it gathers and transmits light rays for visual inspection.[5]

We next consider whether the dominant or primary use of the sights in issue lies in the employment of their optical elements. One of the crucial questions in this respect is the purpose of the lens. As to this, plaintiff's witness Ruder, the inventor of the sights in question, stated that the purpose of the lens is to place the image of the red aiming spot in a comfortable focal plane to one's eye (R. 77), and that it operates to enable the eye, which is focusing on a distant object, to accommodate to the aiming spot through elimination of the fuzziness of that spot, in somewhat the same fashion as a pair of eyeglasses would eliminate the fuzziness of reading material, although the subject lens places the image of the aiming spot at infinity, while eyeglass lenses do not (R. 103–5). In regard to the magnification of the lens, Mr. Ruder, after testifying on direct examination that the lens did not magnify the image of the red aiming spot (R. 72, 78), testified on rebuttal (after having heard defendant's witness Mastrom testify to the contrary), that the lens present in the imported sights *does* provide a degree of magnification, i.e., it magnifies an object (the red aiming spot) for inspection (R. 213–14). Attempting to explain his previous testimony to the contrary, Mr. Ruder stated that it is *only* when the eye is placed in the same position as the lens in the imported sights that the lens does not magnify (R. 211, 214), but that when the eye is placed at any distance away from the lens, the image of the red aiming spot *will* be magnified (R. 216).[6] Additionally, Mr. Ruder stated that the lens operates to render parallel the light rays absorbed by the sight (R. 100).

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[5] Even if the red translucent plastic object is not an optical element, inasmuch as the statutory definition for an "optical instrument" requires only that it incorporate *one* or more optical elements, the presence of the lens alone in the imported sights is enough fully to satisfy this initial requirement.

[6] The record, as previously pointed out, makes clear that the shooter's eye should be about 3 to 5 inches away from the edge of the sight.

Defendant's witness Mastrom stated that the lens performs two essential functions with respect to the imported sight: (1) it provides an image of the red dot at a comfortable viewing distance, i.e., it "collimates the red object for the user's eye" (R. 157), and (2) in this collimating capacity, it orients the line of sight (*ibid.*), that is, it provides a distinct line of sight direction for the red dot (R. 158). This is corroborated by the testimony of defendant's witness Ackerman (R. 196, 201), who had designed a sight similar in principle to the imported sight.[7]

Further, the Normark booklet states at page 3 that the lens incorporated in the sight "magnifies and intensifies a light source," and at page 4 that "[t]he lens eliminates chromatic and spherical aberrations and produces a magnified image of the light point."[8]

In sum, the lens in the imported sight serves the following purposes:

1. It presents an image of the red aiming spot at a comfortable viewing distance to one's eye, i.e., it provides a focusing capability for the eye.

2. It magnifies the image of the red aiming spot.

3. It renders the light rays absorbed by the sight parallel, i.e., it acts as a collimator.

4. It operates to orient the line of sight by providing a direct line of sight direction for the red aiming spot.

Turning now to the function of the red plastic object in the imported sight, Mr. Ruder testified that its purpose is to gather light and color the aiming spot (R. 98). This is corroborated by the Normark booklet which states at page 6 that in addition to performing a light-gathering function, the red plastic object "transmits" red light rays toward the lens. In addition, Mr. Mastrom's testimony regarding the functions of this object is consistent with the foregoing in that he stated that the red plastic object acts as an optical filter absorbing all light transmitted through it except for those rays in the area of the red portion of the visible spectrum and that the object is shaped so as to gather light from the brightest portions of the sky (R. 167).

With the foregoing considerations in mind, we now proceed to determine whether the functions of the lens and red plastic object, as heretofore discussed, are merely incidental or "subsidiary," as they relate to the operation of the imported sight (as plaintiff contends),

[7] The testimony of plaintiff's witness Johnston that the lens is an unnecessary element in the sights at bar (R. 132); that a piece of plain glass could be used as efficiently (R. 133); and that, in his opinion, the only reason for utilization of a lens in the merchandise herein is for the purpose of keeping dust out (R. 133) cannot be given any weight. Not only is this testimony contrary to all the credible evidence in the record, it is totally inconsistent with the prior testimony of the inventor of the sight, Mr. Ruder, that a piece of plain glass *could not* be used because it would result in an optical accommodation problem (R. 77-79).

[8] "Chromatic aberration" is defined in *Webster's Third New International Dictionary* (1963) as an "aberration caused by the different refrangibilities of the colored rays of the spectrum." "Spherical aberration" is defined in the same source as an "aberration caused by the spherical form of a lens or mirror that gives different foci for central and marginal rays."

or whether the dominant or primary use of the imported sight lies in the employment of those two optical features (as defendant contends).

Relevant on this score is the manner in which the imported sight is used. This is described in the Normark booklet as follows (p. 2):

> * * * [The imported] Sights are meant to be used as a game sight where quick, fast sighting is necessary, such as in brush or heavily wooded areas. To use it effectively, you simply shoot with both eyes open. It is an optical sighting device, and when positioned on the gun similar to a telescopic sight, you simply raise your gun and sight with both eyes open. With your left eye concentrating on the target and your right eye looking at the sighting device, you will see a red dot at infinity on the target. When the red dot is on the target, pull the trigger.

This use of the sights in issue would indeed be frustrated if its optical elements, namely the lens and red plastic object, were not present therein. As stated by defendant's witness Mastrom (R. 158–59), if the lens were removed from the sights at issue, the aiming spot would no longer appear to the user at infinity, so that not only would that spot appear out of focus, but there would exist an accommodation problem as well. That is, in the process of normal binocular vision, both eyes must focus on the same point (R. 67). The lens present in the imported sight creates an image of the red aiming spot for the sighting eye at the same point at which the non-sighting eye is viewing the target, i.e., at infinity, so that both eyes are focusing at the same point. Without the lens, either the target or the aiming spot would be continually out of focus, depending upon which of those objects the user's eyes were concentrating on; one's eyes cannot simultaneously accommodate to both a distant object (target) and one that is near (red aiming spot). Hence, the lens operates to accommodate for the different viewing distances.

Secondly, without the lens the sights in question would provide no line of sight orientation relative to the target. More particularly, the red aiming spot is aligned in such a way that it is directly keyed in, by operation of the lens, to the point of impact. Thus, page 2 of the Normark booklet observes that "in the case of the shotgun, the dot is sighted in to coincide with the pattern of the gun, in the case of the rifle, the dot is directed to where the impact of the bullet strikes." As defendant's witness Ackerman testified, if the imported sight is used without the lens, the dot can be superimposed *anywhere* merely by moving one's head (R. 201), thus eliminating that predetermined point of sight direction which is the *sine qua non* of the sights at issue. This, of course, would not occur when the lens is in place in the sight.

Furthermore, the fact that the red aiming spot would be substantially reduced in size were the lens to be removed from the subject

sights would undoubtedly render the sights more difficult to use.

Turning to the primary function of the red plastic object with regard to the operation of the imported sights, its purposes, as discussed before, are to gather light, filter out all light rays except for those in the red portion of the visible spectrum, and transmit those red rays, in the form of a red aiming spot, toward the lens. Obviously, the fact that a *red* dot was chosen by the inventor, was to provide the user with an easily recognizable aiming point which contrasts with sky and foliage (R. 102). If, however, that red plastic object were to be removed from the sights, the sights would no longer be capable of gathering light rays from the brighter portions of the sky and the only light rays which would be absorbed by the sights would be those entering on a course directly parallel to the aperture in the sight, from whatever direction the weapon was being aimed. Hence the user would perceive a considerably less illuminated image of the aiming spot, thus rendering it more difficult to sight quickly upon the target. Also without the red plastic object, there would no longer be an aiming spot in direct color contrast to the sky and foliage. Instead, the image of the aiming spot would assume the color of whatever light happened to come through from the point of sight direction (R. 103).

It is thus clear that the absence of both the lens and red plastic object from the imported sight, or the absence of either component for that matter, would completely frustrate its basic function as a gunsight.

In these circumstances, the statutory criteria for classification of the imported sight as an "optical instrument" have been fully met. And in this connection it is interesting to note that the testimony of defendant's witnesses Mastrom and Ackerman that the imported sights are "optical instruments" (R. 157, 196), comports with the categorization which Normark, the ultimate consignee herein, has itself given to its own product. Thus the Normark booklet states at page 11 that the sight in question "is an *optic sighting device* that looks like the normal telescopic sight. It is a telescope under the definition that a telescope is an optic instrument that magnifies a point of light." (Emphasis added.)

III

Finally, even if the criteria set out in *Engis* were deemed to be applicable here (see note 4, *supra*), the sights would still be classifiable as "optical instruments." Thus, it has already been demonstrated that the sight functions in such manner that employment of its optical features, i.e., the lens and red plastic object, is dominant or primary; that those optical elements are essential to the operation of the sight; and that in performing its intended function, the sight acts

upon, deals with, or routes rays of light. The final requirement, as specified in *Engis*, is that the optical system aid human vision or create for inspection a picture or image of some object. In the court's view, the sights at bar fulfill both of these criteria.

Concededly, the sights at bar do not operate to improve the user's vision, *per se*, i.e., they do not help him to see the target better. However, the requirement is not that the instrument necessarily *improve* human vision, but *aid* human vision. In this connection, reference is made to *Webster's Third New International Dictionary* (1963), wherein the term "[gun]sight" is defined as follows (p. 2114):

> 11a (1): a device for guiding the eye in aiming a firearm * * *.

Inasmuch as the function of any gunsight is, therefore, to "guide the eye" of the user to the desired point of impact, it follows that all gunsights operate to aid human vision. That is precisely why they are utilized. Plaintiff agrees with this since it states at page 26 of its brief that "[i]ron, or open, sights are the type of gunsights normally sold with firearms, consisting of a notch and bead. *It could be said that such sights aid vision, but they would hardly be considered as optical.*" (Emphasis added.) Open or iron sights could "hardly be considered as optical" because, although they do in fact aid vision, they do not incorporate one or more optical elements. But this is not the case with the sights in question which, as has been shown, do incorporate one or more optical elements. Further, the sights could even be said to *improve* vision, inasmuch as the lens incorporated therein effects a magnification of the aiming spot, thus facilitating the visual perception thereof.

Further, the record is clear that the sights create for inspection an image, i.e., an image of the red aiming spot. With regard to plaintiff's assertion that "[t]he sight does not create an image in an active sense" (plaintiff's brief, p. 27), there exists testimony in the record to the contrary. Thus, defendant's witness Mastrom stated, on cross-examination, that the sights in issue, by virtue of the lens incorporated therein, create *an image* of the red aiming spot at infinity (R. 174, 177), and that he would consider that image to be an active rather than passive object (R. 173). Also, plaintiff's witness Ruder agreed that the aiming spot is a result of the interplay of the components of the imported sights (R. 98).

In short, not only do the imported guns fall within the headnote 3 definition of "optical instruments," they satisfy the *Engis* criteria for classification of imported articles as "optical instruments."

IV

As indicated before, plaintiff claims that the F/A 010 gunsights should have been properly classifiable under item 730.67 as other

parts of rifles and that the F/A 012 sights should have been properly classifiable under item 730.75 as other parts of shotguns. Relevant to these claims is General Interpretative Rule 10(ij) of the tariff schedules which provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, *but does not prevail over a specific provision for such part.*" (Emphasis added.) As stated by this court in *American Laubscher Corp. et al.* v. *United States*, 64 Cust. Ct. 384, 388, C.D. 4006 (1970), the phrase "specific provision for such part" in rule 10(ij) has been construed as applicable to tariff provisions which describe an article by either name or specific function. See also, e.g., *J. E. Bernard & Co., Inc.* v. *United States*, 59 Cust. Ct. 31, 36, C.D. 3060 (1967). Also, in *Robert Bosch Corp. et al.* v. *United States*, 63 Cust. Ct. 187, C.D. 3895 (1969), the court stated (p. 193):

> We gather that the words "a specific provision for such part" in the context of Rule 10(ij) are satisfied if a generic term for an article has been listed in the schedules, and must conclude that the language of 685.22 [other radiotelegraphic and radiotelephonic transmission and reception apparatus] is a sufficiently specific designation for automobile radios and antennas to prevent their classification as parts of automobiles.

Against this background, the provision under which the imported merchandise was classified, namely, item 708.89—covering other optical appliances and instruments—is clearly "specific" in providing for the articles at bar by both name and specific function. The imported sights have been shown to be "optical instruments" and were classified as "optical instruments." Inasmuch as these articles are thus specifically provided for in the tariff schedules, their classification as parts of rifles, or parts of shotguns, is thus precluded by operation of General Interpretative Rule 10(ij).

For the foregoing reasons, it is concluded that the gunsights in issue were properly classified under item 708.89 as other optical appliances and instruments. Plaintiff's claims are overruled and judgment will be entered accordingly.

(C.D. 4669)

HUB FLORAL CORPORATION *v.* UNITED STATES

Chenille stems

CHENILLE STEMS—COVERED WIRE

Chenille stems composed of two strands of wire twisted around textile material in a manner which allows textile fibers to protrude held properly classifiable as other wire covered with textile material

under item 642.97 of the TSUS. The wire articles provided for in item 642.97 need not be limited to single strands of wire nor do they have to be covered in the conventional manner or with the same completeness as electrical wire.

CHENILLE STEMS—USE

Plaintiff's proof established that the use of chenille stems by florists to stem live flowers and fashion floral arrangements exceeded the use by hobbyists in making artificial flowers.

Court No. 71-9-01092

Port of Boston

[Judgment for plaintiff.]

(Decided August 31, 1976)

Doherty and Melahn (*William E. Melahn* and *Walter E. Doherty, Jr.* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Frank J. Desiderio* and *Edmund F. Schmidt*, trial attorneys), for the defendant.

WATSON, Judge: This case involves the classification of articles known as chenille stems, 12-inch lengths of flexible wire twisted around textile material in a manner which allows the textile fibers to protrude prominently, giving the article a fuzzy caterpillar-like appearance. The chenille stems were classified as parts of artificial flowers,[1] a classification which in the terms of the tariff schedules general interpretive rules presupposes that the use of these articles as parts of artificial flowers exceeds all other uses combined.[2]

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[1] Item 748.21 of the Tariff Schedules of the United States:

Artificial flowers, trees, foliage, fruits, vegetables, grasses, or grains, parts of the foregoing, and articles made of the foregoing (except articles provided for in item 748.15 or 748.40 of this subpart):

* * * * * * *

748.21 Other ..... 42.5% ad val.

General Headnotes and Rules of Interpretation

* * * * * * *

10. General Interpretative Rules. For the purposes of these schedules—

* * * * * * *

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

* * * * * * *

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

Plaintiff argues for classification of the chenille stems as other wire covered with textile material [3] or alternatively as strands of wire covered with textile material.[4]

Plaintiff disproved the correctness of the assigned classification by showing it resulted from the erroneous reasoning that the use of such articles as stems for live flowers was a use as parts of artificial flowers. This error in the classification was revealed in the testimony of the customs import specialist who made the advisory classification and apparently arose from his reliance on a customs classification circular (C.I.E. 1705/64). That document (exhibit 2) was circulated to customs officials to promote uniform classification of chenille stems as parts of artificial flowers and it spoke of these articles as follows:

> The chenille stems are of metal wire covered with textile materials and are for insertion into the heads of natural flowers to serve as flower stems. . . .

The reasoning embodied in this circular and applied to the classification of the importations at bar is faulty. The tariff provision for artificial flowers envisions flowers which are entirely artificial. A natural flower with an artificial stem is not an artificial flower. It follows that the artificial stem of a natural flower is not part of an artificial flower.

After this demonstration of the erroneous nature of the classification, the case in effect became a fresh dispute with the government advocating classification as parts of artificial flowers based on chief use by hobbyists in the fashioning of artificial flowers and the plaintiff seeking to prove a greater use by florists in stemming natural flowers and making floral arrangements.

On this issue I found plaintiff's proof the more persuasive of the two, leading me to conclude that the uses of these articles by florists in connection with natural flowers exceeds that of hobbyists in making artificial flowers. Aside from the conflict of testimony from which I

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[3] Item 642.97 of the TSUS, as modified by T.D. 68-9:

Milliners' wire and other wire covered with textile or other material not wholly of metal:

642.97	Other	[1969] 12% ad val. [1970] 11% ad val.

[4] Item 642.18 of the TSUS, as modified by T.D. 68-9:

Strands, ropes, cables, and cordage, all the foregoing, of wire, whether or not cut to length, and whether or not fitted with hooks, swivels, clamps, clips, thimbles, sockets, or other fittings or made up into slings, cargo nets, or similar articles:

Not fitted with fittings and not made up into articles:

642.18	Covered with textile or other nonmetallic material	[1969] 12% ad val. [1970] 10% ad val.

felt defendant's witnesses came away second best, defendant's case was weakened by the aforementioned evidence of its previous reliance on the use of these articles in stemming natural flowers. I was not persuaded by defendant's argument that the stemming use had declined with the introduction of newer products in the field.

Furthermore, I found the proof as to the uses of individual hobbyists to be less than satisfactory. The multitude of forms and articles which can be made from these importations by the individual hobbyists made the proposition that only flowers are made in significant numbers seem tenuous to me. I found the proof of use by florists more direct, more credible and more plausible.

Following plaintiff's successful proof that the use of these articles by florists in connection with live flowers exceeds the use by hobbyists in fashioning artificial flowers (which is a negation of possible chief use as parts of artificial flowers) the dispute focuses on plaintiff's primary claim that these articles are properly classifiable as other wire covered with textile material under item 642.97 and its alternative claim that they are classifiable as strands of wire covered with textile material under item 642.18.

Defendant argues that the wire referred to in item 642.97 must be a single metal filament because the definition of wire in headnote 3(i) of schedule 6, part 2, subpart B speaks of wire in the singular as "[a] finished, drawn, non-tubular product, of any cross-sectional configuration, in coils or cut to length and not over 0.703 inch in maximum cross-sectional dimension."

If indeed this headnote means that wires named in part 2 of schedule 6 can only be classified therein if they consist of a single metal filament I would not consider this limitation to extend to the wire articles set out in part 3 of schedule 6, the part with which we are here concerned. In part 2, subpart B, wire is being considered in its quintessential form as one of the basic shapes of iron or steel (schedule 6, part 2, subpart B, headnote 1). In such a context a limitation to articles of irreducible single filament form might be plausible. However, part 3 deals with wire in more differentiated forms in which a limitation to single filament articles would be artificial. I fail to see for example how the barbed wire of item 642.02 would not be considered barbed wire if it were composed of a double strand of wire set with barbs or how the galvanized wire fencing of item 642.35 would exclude fencing composed of doubled wire.

Moreover, the headnote to part 3 which deals with wire refers back to the part 2 headnote only for the maximum cross-sectional measurement and does not reiterate the remaining language with its potential single filament implications. It states that " 'wire' is deemed to be a base-metal product which conforms to the respective cross-sectional

measurements for base-metal wires in part 2, *whether or not conforming otherwise to the specifications set forth therein.*" (Emphasis supplied.) It seems to me the headnote to part 3 was written with an awareness that it was directed to articles composed of wire and still displaying the characteristics of wire but without any intention that the wires referred to in part 3 be single filament articles only.

Consequently, when the tariff provision to which item 642.97 refers lists milliners' wire and other wire covered with textile material, I see no reason either in the headnote or in the fact that wire in its basic form may be defined in the singular to hold that these articles may not be composed of more than one filament of wire. In short I would not read a limitation to single filament articles into part 3 because the only headnote from which such a limitation could be derived does not apply to part 3 except to provide a cross-sectional measurement and the more reasonable way to read the wire articles named in part 3, including item 642.97, is to require that they be composed of wire with the requisite cross-sectional dimension and not necessarily that they be a single filament of that wire.

In somewhat the same vein as defendant's argument that the wire described in item 642.97 must be of a single filament is its contention that the textile covering must be a complete covering.

I don't think it is correct to posit a single unvarying meaning for the word "covered." In the abstract sense it certainly will admit of meanings which allow a less than all-enclosing covering. In the provision under consideration, I can understand it to describe wire which has a textile covering which for some reason still allows glimpses of the underlying wire.

Defendant relies heavily on the existence in prior tariff acts of a single provision governing covered wire (paragraph 316(a) of the Tariff Act of 1930; paragraph 316 of the Tariff Act of 1922). I don't think those provisions or their interpretations ever foreclosed the possibility of a less than "perfect" covering. In fact, when the word "covered" was implicitly treated as meaning completely covered, it was only with respect to electrical wire where such a view has an obvious logical and functional basis.[5] However, the provision under consideration resulted from a deliberate and clearly expressed intention to distinguish in the tariff schedules between "electrical" and nonelectrical wire. (*Tariff Classification Study*, 1960, Schedule 6, p. 183.)

It follows in my view that the interpretation of covering which should be made in this new provision should relate to the nature of the articles provided for and not be an unquestioning automatic

[5] *United States* v. *C. J. Tower & Sons*, 17 CCPA 201, T.D. 43647 (1929); *Mitsui & Co. (U.S.A.), Inc.* v *United States*, 65 Cust. Ct. 268, 271-72, C.D. 4087 (1970).

carryover from prior consideration of electrical wire. It is my opinion the wire provided for in this item is of a type regarding which a requirement of a perfect covering would be unrealistic and excessive.

Milliners' wire is a fiber-wrapped wire which is sewn into hats to provide shaping. The existence of wires of a similar nature was recognized in the 1948 *Summaries of Tariff Information* (Vol. 3, part 2, p. 127) when mention was made of covered steel wire—". . . for fastening decorations, as for florists, and other nonelectrical uses." Still further back is found mention in the *Summary of Tariff Information* of 1921 (p. 407) of wire covered with cotton, silk, paper or other materials, used extensively in the manufacture of millinery, novelties, tags, artificial flowers, clothing and electrical manufactures. I therefore find good reason to associate the imported wire (which has here been proved to be used predominantly by florists in stemming flowers and fashioning floral arrangements) with the covered wires which have been historically noted and recently provided for in the separate provision of item 642.97. I further find that these are not articles in which there is a reasonable ground for demanding absolute perfection or conventional completeness of covering. There is no indication that their covering need be more than substantial to have them serve the purpose for which they are used.

My examination of these articles persuades me that they are covered within the meaning of that term. Admittedly the textile material which forms the cover is initially entrapped between two strands of wire so that the filaments which form the cover emanate from the core of the article. But the practical, tactile and visual result is a covered wire. The purpose of uniting the wire and the textile material is to obtain a product with the flexible strength of wire and the external characteristics of the fiber. These external characteristics are an aid to the comfortable handling and manipulation of the wire, an important improvement of its gripping power and a cushioning of what would otherwise be the damaging impress of the wire on the material around which it may be twisted. The fibers also have an obvious visual effect, adding color and bulk to the wire and concealing it to a great extent from all but the closest scrutiny. These are all functions of a covering and to hold that this article is not covered merely because the covering is achieved in an unconventional manner and to a less than total extent would be unreasonably restrictive.

In sum, I conclude that these chenille stems are wire covered with textile material and are not to be excluded from the provision which is most appropriate for their classification both by plain meaning and history merely because they are composed of two strands of wire and are covered in an unconventional manner.

In light of my conclusions regarding the appropriateness of item 642.97, particularly as viewed in its historical context, I do not

dwell on plaintiff's alternative claim under item 642.18. Although that provision might have some literal appeal in that it speaks of "strands" of wire, I read it as governing articles made to sustain weight or tension or transmit force in some manner. *See Flexible Plumber Tools, Inc.* v. *United States*, 66 Cust. Ct. 330, C.D. 4210 (1971).

Judgment will be entered accordingly.

(C.D. 4670)

TILTON TEXTILE CORP. *v.* UNITED STATES

PILE FABRIC—WOVEN COTTON FABRIC

Certain greige unbleached woven cotton fabric was classified by the government as a velveteen pile fabric under item 346.15 of the Tariff Schedules of the United States. The importation was held not to be a pile fabric within the meaning of the heading governing item 346.15 and was therefore held properly classifiable under item 320.14, as claimed by plaintiff.

PILE FABRIC

Legislative history and lexicographic authorities establish that to constitute a pile fabric the cloth must be covered at least in part by a raised pile projecting from the surface which pile may be wholly or partly cut or uncut. The merchandise in issue lacks the requisite raised pile formation.

Court Nos. 73-6-01404, etc.

Port of Norfolk

[Judgment for plaintiff.]

(Decided October 15, 1976)

Siegel, Mandell & Davidson (*Steven S. Weiser* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Robert B. Silverman*, trial attorney), for the defendant.

Lamb & Lerch (*David A. Golden* of counsel) as amicus curiae.

MALETZ, Judge: This action involves the proper classification of "carded greige unbleached woven fabric, wholly of cotton, Style No. 44144," exported from Portugal and entered at the port of Norfolk, Virginia in 1969 and 1970. The merchandise was classified by Customs as a pile fabric, specifically, cotton plainback velveteen, under item 346.15 of the Tariff Schedules of the United States (TSUS) and assessed duty at the rate of 25 per centum ad valorem.

Plaintiff contends that the import is not a pile fabric within the intendment of item 346.15 and its governing heading, but that it is

properly classifiable as cotton woven fabric, not fancy or figured: not bleached and not colored: of number 14, under item 320.14, TSUS, as modified by Pres. Proc. 3822, which during the involved period carried a duty rate of 9.42 or 9.94 per centum ad valorem depending upon the date of entry.

The pertinent provisions of the Tariff Schedules of the United States read as follows:

Assessed under:

Schedule 3, Part 4, Subpart A:

	Pile fabrics, in which the pile was inserted or knotted during the weaving or knitting, whether or not the pile covers the entire surface, and whether the pile is wholly or partly cut or is not cut:	
	Of cotton:	
*	* * * * * * *	
	Velveteens:	
346.15	Plain-back	25% ad val.

Claimed under:

Schedule 3, Part 3:

Part 3 headnote:

1. This part covers all woven fabrics in the piece, of any width and with or without fast edges, including gauze and leno-woven fabrics, but does not include—

(i) any woven fabrics which are specially provided for in the provisions of part 4 of this schedule;

* * * * * * *

Subpart A:

* * * * * * *

	Woven fabrics other than the foregoing, wholly of cotton:	
	Not fancy or figured:	
	Not bleached and not colored:	
*	* * * * * * *	
320.14	Of number 14	9.42% or 9.94% ad val. [depending upon the date of entry]

I

The pleadings establish the existence of all the elements necessary to support plaintiff's claim for classification under item 320.14. However, headnote 1(i) of schedule 3, part 3, *supra*, provides that articles classifiable under part 4 of schedule 3 are excluded from classification under part 3 of that schedule. Accordingly, it is plaintiff's burden to establish error in the presumptively correct classification of the merchandise under item 346.15.

Summarizing our conclusions at the outset, we find that, for tariff classification purposes, velveteen must have a certain characteristic weave or construction, described *infra*, and a raised pile, which may be wholly or partly cut or not cut, issuing from the fabric and covering its surface at least in part. Since the imported fabric presents no such pile face or effect, we conclude that it is not within the ambit of the pile fabrics provision under which it was classified and is properly classifiable under item 320.14, as claimed by plaintiff.

II

The testimony of record [1] conflicts on several points; however, it is not disputed that a common denominator of all pile fabrics is their construction, which consists of a foundation cloth made of warp and filling threads, and an extra set of threads, which may be warp or filling yarns, which form the pile. Essentially, there are two types of pile fabrics: warp pile fabrics, such as velvet, plush and terry fabrics, which are constructed with an additional set of warp threads; and filling pile fabrics, such as velveteen and corduroy, which are constructed with an extra set of filling yarns.[2]

Velveteen is constructed of a foundation or base cloth made of warp yarns interlaced with one set of filling (or weft) yarns known as binder picks or foundation picks and an extra set of filling yarns, variously

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[1] Plaintiff introduced 11 exhibits into evidence and called two witnesses: Theodore Stone, president of the plaintiff corporation, who had purchased the subject merchandise; and Francis K. Burr, associate director of Fabric Research Laboratories, Inc., a research and consulting firm for the textile industry in connection with textile fibers and fabrics, who now analyzes fabric defects and construction and acts as an expert witness in judicial and arbitration proceedings.

Defendant had 9 exhibits received into evidence and called four witnesses: John Gray, chief fabric designer for Crompton Company, now the sole domestic manufacturer of velveteens; Alan A. Lowe, director of fabric development and new products for Greenwood Mills, Inc., a manufacturer of woven and knit fabrics which had also manufactured velveteen in the greige until 1971; Stephen Siegel, director of technical services, Cottons and Blends Division, of J. P. Stevens, Inc., a manufacturer of textile products, including pile fabrics; and Richard Lutzer, textile analyst and assistant chief of the Fibers Branch, U.S. Customs Laboratory.

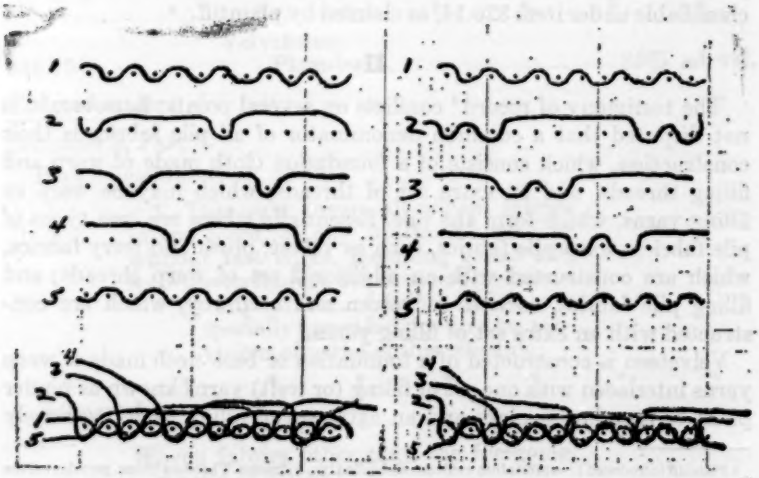
Two joint exhibits were received, and the official entry papers were admitted into evidence without being marked.

[2] Although not limited thereto, the pile fabrics provided for by name in the tariff schedules are cotton corduroys and velveteens, terry fabrics, velvets, plushes, velours and chenilles.

referred to by the witnesses as pile threads, pile floats, filling picks, pile picks, filling floats, float picks and loops, which interlace with the warp yarns in a fixed pattern. Thus, the additional filling thread may, for example, interlace with one or more warp yarns and then "float" over the surface of the fabric covering three or more warp yarns to interlace again with the next one or more warp ends and repeat the floating processes. The floats are staggered in the weave, as shown in defendant's exhibit B, which was prepared by the witness Gray, and which, reproduced in part below, presents illustrative cross sections of what Gray calls a "single U" plainback weave, and a "W" plainback weave.[3]

CROSS SECTION OF VELVETEEN WEAVES

SINGLE U PLAINBACK W PLAINBACK



The dots represent the warp yarn.
The numbered lines represent the filling yarn.

Woven warp pile fabrics are constructed so that they come off the looms with a raised pile, which may consist of cut ends or loops, on the surface of the fabric. Thus, velvet, which is usually woven by a so-called "double cloth" method, has a pile consisting of cut ends,

[3] Lines 1 and 5 in each column represent the warp and filling yarns which form the foundation cloth, and lines 2, 3 and 4 represent the staggered filling floats.

whereas terry cloth is woven so that it may have cut or uncut loops, or a combination of both emerging from either side of the fabric.

Filling pile fabrics, on the other hand, come off the loom in the weave mill with their filling floats or pile picks uncut, Thus, fabrics with a velveteen or corduroy weave must have their floats cut in the finishing process in order to obtain the pile formation on the fabric surface. When the pile picks which (as noted) consist of extra threads are cut, the foundation fabric remains undisturbed.

The pile on velveteen usually presents an overall smooth face because of the staggered system of filling floats whereas in corduroy, because of the arrangement of the filling floats, the pile consists of ridges or wales.

The velveteen woven fabric that comes off the looms is a greige goods which, for conversion into cut finished velveteen, is sent to a finishing plant where the filling floats are cut with knives to create a pile on the face of the fabric. The fabric is also subjected to other finishing operations which may include dyeing, bleaching and the application of an adhesive or other substance to keep the cut pile from shedding.

There is some limited commercial use for greige uncut fabric. Thus, the witness Gray testified that the greige cloth manufactured by his company has been sold at his factory's retail stores for use as draperies or curtains. The greige cloth is also capable of being converted into something other than cut velveteen, such as a napped fabric.[4]

Good quality dress velveteens have a minimum of 200 filling yarns per square inch but poorer quality velveteens of lesser density, i.e., under 200 filling yarns per inch, have been made and sold for use as background display material.

III

Turning to the merchandise in issue, it is undisputed that it is a woven greige cotton fabric constructed of warp yarns or threads and two sets of filling yarn, one of which is used as a ground filling yarn with the warp yarn to form the foundation fabric, and the other, consisting of pile filling yarns, used as filling floats in a weave characterized by Gray as a "double U" type plainback construction, a cross section of which is shown on defendant's exhibit B and reproduced below. In this particular weave, the pile pick is interlaced under two warp ends and floats over four threads. The fabric has 144 filling yarns per inch.

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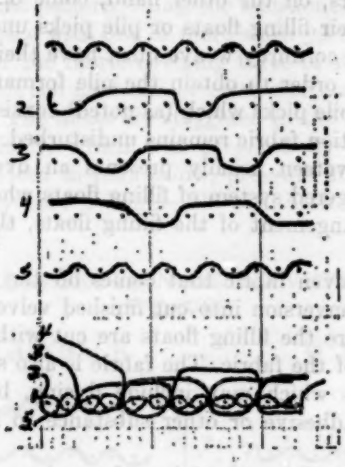
[4] A napped cloth, as described by the witness Burr, is (R. 57):

• • • one whose surface has been brushed with wire brushes; can be a sanding operation; can be a teaseling operation. The fibers of the surface have been disturbed by a rubbing action which produces a soft sueded type finish.

DOUBLE U PLAINBACK



Lines 2, 3 and 4 represent the filling floats.

After importation, plaintiff, a textile coverter, dyes, naps and imparts a water repellent finish to the fabric, which is then sold for use in the manufacture of outerwear garments.

The parties differ, in the first instance, over whether the imported merchandise is of velveteen construction, plaintiff claiming that a filling pile fabric with only 144 filling yarns per inch lacks the requisite density to be a "velveteen" within the meaning of item 346.15.

The heart of the issue, however, is whether a greige filling pile fabric with uncut filling floats or pile can be a "pile fabric" within the intendment of the pile fabric provisions and their governing heading.

It is plaintiff's contention that a pile fabric is one which has a pile formation, consisting of yarns in cut or loop form, projecting from the surface, albeit covering only part of the surface; that a velveteen woven fabric, by virtue of its construction, does not have a pile formation until the extra filling yarns, viz., pile picks or filling floats, are cut in the finishing process; and that inasmuch as a greige velveteen, in its condition as it comes off the weave loom, lacks the requisite pile effect it is not a pile fabric within the ambit of the tariff schedules. Hence, even if the imported cloth were considered to be a greige velveteen, plaintiff's contention is that it is not a pile fabric since it does not have a pile.

Thus, plaintiff's witness, Burr, testified that velveteen in the griege condition is not a pile fabric in that the filling floats have not been cut to produce a pile on the surface, but that it is "potentially" a pile fabric as the floats can be cut to form the pile. In this connection, he stated on direct examination (R. 43–44).

> Q. * * * You stated that an example of a cut weft pile fabric or filling pile fabric is a velveteen or corduroy. Would you consider a velveteen or corduroy as a pile fabric if it is uncut?
> A. No, it has no pile and, therefore, until it has been subsequently processed, it is simply greige goods and cannot be properly classified as a pile fabric.
> Q. Why doesn't it have a pile?
> A. Because the yarns of the fabric run parallel to the surface of the fabric. There are no projecting fibers, yarns, loops, from the surface of the fabric.
> Q. Is a warp pile fabric, such as you have mentioned, considered to be a pile fabric if the loops are uncut?
>
> * * * * * * *
>
> A. Well, in the case of a warp pile fabric, by its definition and method of manufacture, the pile is cut, as in the case of velvet. coming from the loom, and it is already a pile fabric. The terry cloth, with its loops projecting from the surface, is already a pile fabric because it has loops of yarns projecting from the surface of the fabric.
> Q. Is terry a cut or uncut pile?
> A. It can be either.

Upon questioning by the court, Burr added (R. 47–48):

> JUDGE MALETZ: Now, in the greige condition, did I understand, from your testimony, that in that type of situation, the velveteen can be either a pile fabric or a non-pile fabric?
> THE WITNESS: Well, it is potentially a pile fabric, but it isn't until the pile has been made by cutting of the filling yarns. The question is one of timing at that moment. It is not a pile fabric in the greige, but it can be subsequently processed to become a pile fabric.

Defendant's position, however, is that it is the weave or construction of a fabric which makes it a pile fabric; that the insertion of a pile pick or extra filling yarn in filling pile fabric during the weaving process creates a pile which has not been cut; and that the subject merchandise "is within the common meaning of the term *uncut velveteen filling pile fabric* as that term is used in the Tariff Schedules." (Defendant's brief p. 18, emphasis in original.)

In support of this position, defendant's witnesses testified that it is the weave which determines whether a fabric is a velveteen and that plaintiff's exhibit 1, a representative sample of the imported merchandise, is a velveteen because of its construction. They variously described the woven uncut cloth that comes off the loom as "greige uncut velevteen," "uncut velveteen" or "greige velveteen," and

agreed that it would be considered an uncut pile fabric in which the pile is not cut or which can subsequently be cut to produce a pile fabric.

Thus, defendant's witness Gray testified on direct examination (R. 140–142):

> Q. When velveteen is manufactured and it comes off the loom, would you consider it to be a pile fabric?
> A. Yes.
> Q. Why would you consider it to be a pile fabric?
> A. Because it has, as in number one and five [the numbered yarns shown on the illustrative diagrams on exhibit B], foundation binder picks, and some form of combination of two, three, and four, which are pile picks.
> Q. Could it be considered an uncut pile fabric?
> A. Yes.
> Q. Can a velveteen subsequently be cut to produce a cut pile fabric, a cut pile fabric?
> A. Yes.
> Q. Have you had an opportunity to examine Plaintiff's Exhibit 1?
> A. Yes.
>
> * * * * * * *
>
> Q. Based upon your experience and your examination of Plaintiff's Exhibit 1, do you have an opinion as to whether Plaintiff's Exhibit 1 constitutes an uncut plainback velveteen pile fabric?
> A. It does.

Gray also stated that plaintiff's exhibit 1 has a pile composed of loops which he pointed out to the court by inserting a needle under several filling floats and raising them slightly. It was his opinion that plaintiff's exhibit 1 is a "loop" pile fabric (R. 180), but that if the loops were cut the fabric would be called a "cut velveteen" (R. 144). A loop, he testified, could be "projecting upward" even if it "lay horizontally flat" (R. 186), apparently so long as it had "air space" around it and a needle could be inserted into the fabric underneath it (R. 188–190).

This view as to the existence of a pile was not, however, shared by defendant's other witnesses. For example, while defendant's witness Lowe testified that plaintiff's exhibit 1 is a velveteen because of its construction and that it had "pile picks inserted during weaving" (R. 231) which could be subsequently cut so that the end result would be a cut pile fabric or cut velveteen, he distinguished between "pile pick" and "pile" on cross-examination, as follows (R. 245–246):

> A pile pick is the pick inserted in a fabric when it is being woven, which floats enough so that after the cloth has eventually been completely woven, and during the finishing process, can be cut. At this state, it becomes pile.

Elaborating on this aspect, Lowe continued (R. 255):

> Pile is the effect one obtains from cutting pile picks and then brushing them so that the picks are put in basically perpendicular manner on the surface of the cloth.

Defendant's witness Siegel testified that a velveteen is a fabric that can be processed to make a "pile tuft fabric" (R. 273). With respect to plaintiff's exhibit 1, Siegel then testified as follows upon questioning by the court (R. 279–282):

> JUDGE MALETZ: Now, what is there in this fabric which causes you to say—not causes you—what characteristic does Plaintiff's Exhibit 1 have which, in addition to being a velveteen, constitutes it a pile fabric?
>
> THE WITNESS: It is capable of being cut. It *could not be a pile fabric, as such, until it is cut.* It is an uncut pile fabric at that point. It doesn't become a pile—and my definition of a pile would be a pile when a knife is inserted and cuts this loop. [Emphasis added.]
>
> JUDGE MALETZ: Are you saying then that in this particular condition—are you saying then that Plaintiff's Exhibit 1 is capable of becoming a pile fabric after it is cut? Is that your testimony?
>
> THE WITNESS: It is an uncut pile fabric in the state that it is at. There is no—pile has to stand up, in my understanding of pile. So, it cannot be a pile. It is uncut pile or raw material for a pile until this is cut.
>
> JUDGE MALETZ: What I would like to know is this: Is this presently, forgetting about it has not been cut—is this now, in this condition, a pile fabric?
>
> THE WITNESS: If you will allow me to say uncut pile, the answer is yes.
>
> * * * * * * *
>
> JUDGE MALETZ: Do you refer to this as pile fabric in the trade?
>
> THE WITNESS: I have not referred to it, no, sir.
>
> JUDGE MALETZ: Very well. How do you refer to it?
>
> THE WITNESS: We would call it an uncut velveteen.

In response to further questioning from the court, Siegel testified as follows (R. 289):

> JUDGE MALETZ: In the trade, as you understand it, would the fabric like Plaintiff's Exhibit 1 be referred to as a pile fabric? I think you have already answered the question.
>
> THE WITNESS: The answer is yes.
>
> JUDGE MALETZ: Would you refer to it as a pile fabric?
>
> THE WITNESS: We would call it uncut pile, but we would—
>
> JUDGE MALETZ: You would call it uncut pile?
>
> THE WITNESS: Yes.
>
> JUDGE MALETZ: Would you call it pile fabric? That is my question.
>
> THE WITNESS: The answer is no, sir.
>
> BY MR. SILVERMAN: (Cont'g)

Q. May Plaintiff's Exhibit 1 be properly characterized a pile fabric in which the pile is not cut?
A. It is.
Q. May it be properly characterized an uncut or not cut velveteen?
A. It is.

Subsequently, Siegel testified that plaintiff's exhibit 1 is a "pile fabric" with a "raised filling pile" (R. 294) composed of a "flat loop" (R. 302).

Defendant's fourth witness, Lutzer, testified that plaintiff's exhibit 1 is a velveteen pile fabric and defined "pile" as a "raised portion * * * of a base fabric" (R. 349). When asked on cross-examination if plaintiff's exhibit 1 had any short projecting ends, he responded "I don't know" (R. 352). He stated that plaintiff's exhibit 1 is a pile fabric because it has a "pile construction," the pile consisting of the "extra filling yarns" (R. 359).

IV

Against this background, we turn first to the heading set forth; *supra*, governing the pile fabric provisions in subpart A of part 4, schedule 3. The heading limits the scope of these provisions to pile fabrics in which the pile was inserted or knotted during the weaving or knitting, but includes all such fabrics whether or not the pile covers the entire surface and whether the pile is wholly or partly cut or is not cut.

It is not disputed that the first part of the heading refers to the pile picks or extra filling or warp threads which are inserted during the weaving of the fabric. However, as indicated from the foregoing summary of the record, the parties ascribe different meanings to the latter portion of the heading, plaintiff claiming that it plainly requires the existence of a raised pile, which may be wholly or partly cut or not cut (i.e., in loops) upon the surface of the fabric, and defendant contending that it unquestionably refers to the pile pick or filling float inserted in the fabric, whether or not the float is cut or raised from the fabric surface.

Both parties cite various lexicographic and textile authorities as sources for the common meaning of the terms "pile," "pile fabric" and "velveteen," and rely upon judicial decisions of the court and opinions of the Board of General Appraisers construing various predecessor pile fabric provisions to support their respective positions.

It is fundamental that, in the absence of contrary legislative intent, the common meaning of a term controls in construing the tariff statutes, and that common meaning is a matter of law to be determined by the court, E.g., *United States* v. *O. Brager-Larsen*, 36 CCPA 1, 3, CAD 388 (1948). To this end, the court may consult extrinsic sources such as dictionaries and authorities. Further, faced as we are here with conflicting interpretations of the governing tariff heading,

and finding that the disputed language is not without ambiguity, it is appropriate to resort to the legislative history to determine the Congressional intent which is the primary purpose of statutory construction. *United States* v. *Durst Mfg. Co., Inc.*, 46 CCPA 74, CAD 700 (1959); *United States* v. *J. Eisenberg, Inc.*, 43 CCPA 105, CAD 616 (1956).

The term "pile fabrics" was first used in the enumeration of dutiable merchandise in the Tariff Act of 1890, appearing under the cotton, wool and silk schedules in paragraphs 350, 396 and 411, respectively, and was employed in paragraphs 259 and 299 of the cotton and silk schedules in the Tariff Act of 1894.[5]

The phrase "cut or uncut" was subsequently added by Congress in the Tariff Act of 1897 to the cotton (vegetable fiber) and silk pile fabric paragraphs and a provision was added for flax pile fabrics.[6]

The phrase "whether or not the pile covers the entire surface" was added by paragraphs 325 and 353 of the Tariff Act of 1909 to the cotton (or other vegetable fiber except flax) and flax provisions. The term "cut or uncut" was retained in the provision for silk pile fabrics (paragraph 399) which distinguished between velvets and plushes on the basis of "the length of the pile." [7]

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[5] Paragraph 259 of the Tariff Act of 1894 provided for—

Plushes, velvets, velveteens, corduroys, and all pile fabrics composed of cotton or other vegetable fiber, not bleached, dyed, colored, stained, painted, or printed, * * *.

Paragraph 299 of this act provided for—

Velvets, chenilles, or other pile fabrics, composed of silk, or of which silk is the component material of chief value, * * * plushes, composed of silk, or of which silk is the component material of chief value, * * *.

[6] Paragraph 315 of the 1897 act provided for—

Plushes, velvets, velveteens, corduroys, and all pile fabrics, cut or uncut; any of the foregoing composed of cotton or other vegetable fiber, not bleached, dyed, colored, stained, painted, or printed, * * *.

and paragraph 386 of this act covered—

Velvets, velvet or plush ribbons, chenilles, or other pile fabrics, cut or uncut, composed of silk or of which silk is the component material of chief value, * * * plushes * * *.

Paragraph 342 provided for—

All pile fabrics of which flax is the component material of chief value, * * *.

[7] Paragraph 325 provided for—

Plushes, velvets, velveteens, corduroys, and all pile fabrics, cut or uncut, whether or not the pile covers the entire surface; any of the foregoing composed of cotton or other vegetable fiber, except flax, * * *.

and paragraph 353 covered—

All pile fabrics, whether or not the pile covers the entire surface, composed of flax, or of which flax is the component material of chief value, * * *.

Paragraph 399 provided for—

Velvets, chenilles, and other pile fabrics, not specially provided for in this section, cut or uncut, composed wholly or in chief value of silk, * * *. Plushes, cut or uncut, composed wholly or in chief value of silk, * * *. The distinction between "plushes" and "velvets" shall be determined by the length of the pile; those having pile exceeding one-seventh of one inch in length, to be taken as "plushes;" those having pile one-seventh of one inch or less in length, shall be taken as "velvets." The distance from the end of the pile to the bottom of the first binding pick shall be considered as the length of the pile. * * *

In the Tariff Act of 1913, the cotton provision (paragraph 257) and the flax, hemp and ramie pile fabric provision (paragraph 280) retained the added language of their predecessor provisions; two provisions, covering pile fabrics of wool and of animal hair (paragraphs 288 and 309), using the phrases "cut or uncut" and "whether or not the pile covers the entire surface" were added to the dutiable schedules; and paragraph 314, the silk pile fabric provision, was in large part revised, omitting, among others, the phrase "cut or uncut." [8]

The provisions of the 1913 act were revised by the Tariff Act of 1922 which, in accordance with the intent stated in the *Summary of Tariff Information, 1921*,[9] to "secure uniformity" in the pile fabric provisions, used the identical phrasing, "cut or uncut, whether or not the pile covers the whole surface," in the cotton, vegetable fiber (other than cotton) and wool pile fabric paragraphs (910, 1012 and 1110).[10]

It is significant that, consistent with the stated purpose of achieving uniformity in the classification of pile fabrics, regardless of their component materials, the *1921 Summary* uses substantially the same de-

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[8] The pile fabric provisions of the 1913 act read as follows [emphasis added]:

Par. 257. Plushes, velvets, plush or velvet ribbons, velveteens, corduroys, and all pile fabrics, *cut or uncut, whether or not the pile covers the entire surface;* any of the foregoing composed wholly or in chief value of cotton or other vegetable fiber, except flax, hemp, or ramie; * * *.

Par. 280. All pile fabrics, *whether or not the pile covers the entire surface*, composed of flax, hemp, or ramie, or of which flax, hemp, or ramie is the component material of chief value, * * *.

Par. 288. * * * plushes, velvets, and all other pile fabrics, *cut or uncut*, woven or knit, *whether or not the pile covers the entire surface*, made wholly or in chief value of wool, * * *.

Par. 309. Plushes, velvets, and all other pile fabrics, *cut or uncut*, woven or knit, *whether or not the pile covers the entire surface*, made wholly or partly of the hair of Angora goat, alpaca, or other like animals, and articles made wholly or in chief value of such plushes, velvets, or pile fabrics, * * *.

Par. 314. Velvets, plushes, chenilles, velvet or plush ribbons, or other pile fabrics composed of silk or of which silk is the component material of chief value, * * *.

[9] The *1921 Summary* was prepared by the Tariff Commission for the Senate Committee on Finance in connection with its study of H. R. 7456, subsequently enacted as the Tariff Act of 1922. It states, with respect to the proposed provision for pile fabrics of vegetable fiber other than cotton, enacted as par. 1012, that the phrase "cut or uncut" was introduced "to render the provision in this schedule as nearly uniform as possible with the corresponding provision in the cotton schedule" (p. 925), and notes in connection with the provision enacted as par. 1110 (p. 979) that—

The manufacture of pile fabrics forms a distinct branch of the textile industry and for this reason, and to secure uniformity with pile fabric provisions (pars. 909 and 1011) in other textile schedules, a special paragraph is here devoted to pile fabrics and manufactures thereof, falling under the wool schedule. * * *

[10] The pile fabric provisions in the 1922 act read as follows:

Par. 910. Pile fabrics, composed wholly or in chief value of cotton, including plush and velvet ribbons, cut or uncut, whether or not the pile covers the whole surface, * * *.

Par. 1012. Pile fabrics, composed wholly or in chief value of vegetable fiber other than cotton, cut or uncut, whether or not the pile covers the whole surface, * * *.

Par. 1110. Pile fabrics, cut or uncut, whether or not the pile covers the whole surface, made wholly or in chief value of wool, * * *.

The silk pile fabric provision, par. 314, was unchanged. It provided for—

Velvets, plushes, chenilles, velvet or plush ribbons, or other pile fabrics, composed of silk or of which silk is the component material of chief value, * * *.

scriptive language in explaining the scope of each of these provisions. Thus, the sections on cotton, vegetable fiber (other than cotton) and wool pile fabrics all state that: "Pile fabrics consist of a foundation cloth covered in whole or in part by *short projecting ends or loops* made with an extra set of threads." [Pp. 874, 924, 978; emphasis added.]

The section in the *1921 Summary* on cotton pile fabrics also observes (p. 874):

> * * * In the case of velveteen and corduroy this extra set of threads consists of filling whereas in the case of velvet and plush it consists of warp. *Filling piles are always cut whereas warp piles may be either cut or loop (uncut).* Terry-woven fabrics are made by a different method from that used for other pile fabrics and usually have uncut loops on both sides of the cloth. [Emphasis added.]

Further, the section on pile fabrics of vegetable fiber other than cotton states (p. 924), that—

> * * * Pile made of flax, hemp, ramie, jute, etc., lacks the resilience of pile made of cotton, mohair, or silk, and *when pressed down does not readily revert* to its upright position; * * *. [Emphasis added.]

The section on silk pile fabrics states that these fabrics (p. 1027)—

> * * * include cloths and ribbons composed of a woven ground of silk or other material more or less completely concealed by a covering of short silk threads, or pile, *which project from it as cut ends or, in a few fabrics, as loops.* Silk pile cloths are mainly velvets and plushes, which differ principally in that the pile of velvet is the shorter. * * * [Emphasis added.]

It is also noted that the earlier *Summary of Tariff Information, 1920,* states, in the section on cotton pile fabrics, at pp. 409–410 that pile fabrics—

> * * * are distinguished from all other woven articles by their surface, which shows a *series of short ends or loops issuing from the cloth and usually concealing the interlacing of the warp and filling.* They are two kinds—warp piles made with two warps and one filling, producing velvet and plush; and filling piles made with two fillings and one warp, producing such goods as velveteen and corduroy.
>
> Pile fabrics may be plain or figured, commonly the former, and either cut or uncut. Warp-pile fabrics permit of a greater variety of effects and are the most extensively used. Terry-woven cloths are *uncut loop-pile fabrics* made without the aid of wires. * * * [Emphasis added.]

The point of the foregoing recital of these early tariff provisions and the *1920* and *1921 Summaries* is that they demonstrate beyond a doubt that by 1921, a pile fabric, regardless of its component materials, was considered for tariff purposes to be one which had a

pile projecting from the surface of the ground fabric in the form of short ends or loops.

It may be noted that prior to the revisions in 1909 to the pile fabric provisions, the courts and the Board of General Appraisers, in relying upon commercial testimony, had construed the term "pile fabrics" to be limited to goods which had a pile that covered the entire surface of the fabric. What is more significant, in view of the issue raised herein, is that, with one exception referred to in note 11 *infra*, the term was limited to fabrics which had a *raised* pile on their surfaces.

In *McGibbon & Co.* v. *United States*, T.D. 17638–G.A. 3686 (1896), the Board of General Appraisers held that goods that had a raised pile covering only one-half the surface of the fabrics were dutiable as silk pile fabrics under paragraph 299 of the Tariff Act of 1894. The circuit court reversed, 107 Fed. 265 (S.D.N.Y. 1900), holding the goods to be dutiable as manufactures of silk, stating (ibid.):

> * * * Inasmuch as the fabric as a whole is not substantially a pile fabric, and is not commercially known as such, the fact that a portion thereof has a pile surface is not sufficient to constitute it a pile fabric.

The circuit court of appeals affirmed the lower court *per curiam*. See *United States* v. *McGibbon*, 113 Fed. 1021 (2d Cir. 1902).

The *McGibbon* holding was followed in *W. & J. Sloane* v. *United States*, 7 Treas. Dec. 277, T.D. 25037 (1904), involving silk and metal fabrics having a partially raised pile surface which were assessed under the Tariff Act of 1897; and in *McGibbon & Co.* v. *United States*, 7 Treas. Dec. 595, T.D. 25197 (1904), involving silk and cotton fabrics with strips of raised pile upon the face of the goods, which were also assessed under the 1897 act. See also *H. Robinson* v. *United States*, 9 Treas. Dec. 426, T.D. 26149 (1905); and *Stroheim & Romann* v. *United States*, 9 Treas. Dec. 990, T.D. 26447 (1905).

The addition in the 1909 revisions of the cotton and flax provisions of the phrase "whether or not the pile covers the entire surface" limited the effect of the 1897 *McGibbon* holding. However, failure to include this language in paragraph 399, which provided for silk "velvets, chenilles, and other pile fabrics * * * cut or uncut," was contended by the government, in *United States* v. *Schumacher & Co.*, 3 Ct. Cust. Appls. 301, T.D. 32586 (1912), to be demonstrative of Congressional intent that paragraph 399 included only goods that had an "erect pile" upon their entire surface. *Schumacher*, it is to be noted, involved goods composed in chief value of silk having in part a pile surface that were classified by the collector as woven fabrics in the piece under another provision of paragraph 399 on the ground that they were not pile fabrics. The importers protested, claiming that the

goods were classifiable as velvets. The appellate court, noting that the goods, unlike those in *McGibbon*, were almost entirely covered with pile and that the importers had established that the goods in question had been commercially known as pile fabrics for over 30 years, affirmed the decision of the Board of General Appraisers sustaining the protest. Following *Schumacher*, similar decisions were reached by the Board with respect to silk fabrics assessed under the Tariff Act of 1913. See *L. E. Stirn* v. *United States*, 29 Treas. Dec. 165, Abs. 38279 (1915) and *Francois Coste* v. *United States*, 30 Treas. Dec. 1151, Abs. 39907 (1916).

In *M. J. Corbett & Co.*, v. *United States*, 26 Treas. Dec. 970, T.D. 34545 (1914), the Board held that certain cotton "terry cloth," which it stated (p. 971) was woven.

> * * * in such a manner that one face of the goods is practically covered with closely placed loops of thread which issue from the body of the fabric at right angles thereto. * * *

was an "uncut pile fabric" and properly classified as such under paragraph 325 of the Tariff Act of 1909. Referring to the trade testimony bearing on the meaning of the term "pile fabrics," the Board stated (pp. 971–972):

> * * * From the definitions given, it is clear that the term is not used in trade and commerce in any different manner than it is in common speech. As ordinarily understood, a pile fabric is a fabric in which a soft covering or nap overspreads and conceals to a great extent the interlacing of the warp and filling threads. *This nap is formed by a series of threads which issue from the body of the fabric at right angles.* In some fabrics the nap or pile is in the form of a series of loops, such as we find in Brussels carpet, while in others the ends of the threads are cut or sheared off smoothly so as to form a uniform and even surface, presenting the ends of the fiber to the eye, as is ordinarily found in velvets, velveteens, plushes, velours, etc.[11] [Emphasis added.]

The *Corbett* holding was followed in *C. A. Haynes & Co.* v. *United States*, 30 Treas. Dec. 790, T.D. 36403 (1916), with the Board citing the statement in the earlier case that pile fabrics required two systems of warp or filling threads, and commenting (p. 792):

> The reason for this is that, in order to produce the *effect known as the pile fabric*, including velvets, plushes, and astrakhans, this

[11] It is noted that a prior decision of the Board, in *Velutina Bias Company* v. *United States*, 2 Treas. Dec. 160 T.D. 21454 (1899), holding certain unbleached uncut cotton cloth to be properly classifiable as "velveteen uncut" under paragraph 315, Tariff Act of 1897, is in conflict with the holding in *Corbett* and other cases cited herein. The merchandise in *Velutina* had, in fact, been classified as uncut *velvet* under that paragraph but the Board held it to be an uncut *velveteen*. The facts upon which the Board relied are unclear and confusing. The testimony elicited showed that the fabric was imported for conversion into cotton *velvet* and for subsequent conversion into a bias *velveteen*. However, it is not stated whether the extra set of threads was warp or filling. The court found that the cloth was woven especially to be cut and made into a velveteen.

We do not find this opinion to be of assistance to the government's case in light of the later decisions which we discuss below.

> extra and distinct set of warp or filling threads is required. [Emphasis added.]

Also, in *Naday & Fleischer* v. *United States*, 34 Treas. Dec. 677, Abs. 42032 (1918), involving certain cotton dress goods classified as pile fabrics under paragraph 257 of the Tariff Act of 1913, the Board stated (p. 677):

> * * * The cloth is plain woven but the warp threads are of two sizes. The heavy threads which lie about one-eighth of an inch apart were formed into a loop at intervals of about a quarter of an inch and the tops of the loops have been clipped, leaving the raw edges loose. *These loose ends do not extend at right angles from the body of the fabric forming a nap*, as did the so-called pile threads in the case of M. J. Corbett & Co. (G.A. 7572, T.D. 34545), and, following the rule laid down in that case, we find that the goods are not pile fabrics. * * * [Emphasis added.][12]

Of special significance is the construction placed by our appellate court in *Knauth, Nachod & Kuhne* v. *United States*, 6 Ct. Cust. Appls. 128, T.D. 35389 (1915) upon the phrase "cut or uncut" in paragraph 325 of the Tariff Act of 1909, providing (among other things) for cotton pile fabrics. The imported merchandise, consisting of imitation mohair astrakhans composed of jute and cotton, with a closely curled looped pile on the face of the fabric, was assessed under this provision and claimed to be dutiable as manufactures in chief value of cotton or of vegetable fiber.

The court cited dictionary definitions of "pile weaving," "pile" and "pile fabric," and noted (at pp. 129–130) that "pile fabric" was defined in *Knight's American Mechanical Dictionary* as—

> One in which a looped weft is formed by wires, to be afterwards cut, as in velvet and in Wilton carpet, or left in loops, as in Brussels carpet.

The court then stated that the merchandise would be called a pile fabric within these definitions unless it were found that the term was used in a different sense in the tariff statutes. The court observed that astrakhans had formerly been held not to be classifiable as pile fabrics under the Tariff Act of 1890, because they were not so classed within the commercial understanding, and commented thereon as follows (at pp. 130–131):

> It may be noted that this commercial understanding was apparently based upon the view that to constitute a pile fabric as commercially known it must present an appearance similar to that of plushes and velvets. In other words, that the loops must have been cut.

[12] See also *Sherman & Sons Co.* v. *United States*, 37 Treas. Dec. 187, T.D. 38188 (1919), involving fancy striped voiles and dotted marquisettes which were held to be properly classifiable as cotton cloth rather than as pile fabrics under the Tariff Act of 1913.

But in the later statutes, including the one in 1909, here under consideration, the language of the statute is different from that of 1890, and so far from indicating an adoption of the judicial interpretation placed upon the term "pile fabric" * * * the Congress enlarged the term * * *.

* * * * * * *

It is suggested, however, in this case that the evidence shows that this fabric is not capable of being cut, and that for this reason it should be held excluded from the paragraph. We do not think its susceptibility of being cut is essential. Congress evidently had in mind *two classes of pile fabrics, one of which is cut and presents a surface similar to velvet and plush, the other like astrakhan or Brussels carpet, which present a loop surface.* To distingush between two classes the words "cut or uncut" were used, and the use of these words plainly includes all such as are uncut as well as those which are cut. * * * [Emphasis added.]

It is patent from the court's exemplars of *uncut* pile fabrics, i.e., those which have a "loop surface," that it had in mind fabrics with a raised pile.[13]

The 1922 tariff act was succeeded by the Tariff Act of 1930 which made minor changes in the pile fabric provisions and added another to cover pile fabrics of rayon or other synthetic textiles. Thus, paragraph 909 provided for cotton pile fabrics "cut or uncut, whether or not the pile covers the entire surface," and paragraphs 1012, 1110, 1206 and 1307 provided, respectively, for vegetable fiber (other than cotton), wool, silk, and rayon or other synthetic textiles, pile fabric "whether or not the pile covers the entire surface * * * if the pile is wholly cut or wholly uncut * * * [or] if the pile is partly cut."

It does not appear that any changes were intended in the 1930 act in the meaning of the term "pile fabrics," as evidenced by the comments in the *Summary of Tariff Information, 1929*, which was prepared for Congressional use in updating the 1922 act. The *Summary* describes pile fabrics in language markedly similar to that employed in the earlier editions. And using identical language in the sections on the cotton, vegetable fiber (other than cotton) and wool pile fabric provisions it describes pile fabric at pages 1572, 1644, and 1705, as consisting of a—

> * * * foundation cloth covered in whole or in part by short projecting ends or loops produced in the weave with an extra set of threads. * * *

The section on silk pile fabrics states (p. 1765):

> *Pile fabrics are distinguished from all other woven fabrics by their surface, which is covered in whole or in part by a series of short*

[13] It is noted that the *Knauth* and *Corbett* decisions were cited in the *Summary of Tariff Information, 1930*, pp. 410-411.

> *ends or loops projecting from the body of the cloth* and usually concealing the interlacing of the ground warp and filling. These fabrics are known as "cut" or "loop" (uncut) piles, according as the loops have been cut or left as woven. [Emphasis added.]

The foregoing demonstrates that pile fabrics were defined not only in terms of their weave, but of the type of pile "projecting" from the surface of the fabric.

It is worthy of note that this court had occasion to construe the wool pile fabric provisions of the 1922 and 1930 acts in *British & Irish Woolens Corp.* v. *United States*, 65 Treas. Dec. 668, T.D. 47009 (1934), which involved certain wool cloth known as "Montagnac"—a fabric which was produced in the weave with an extra set of filling threads, some of which had been raised and severed by a napper that produced a "hairiness" on the surface of the fabric. The merchandise was assessed as a woven fabric under the 1922 and 1930 acts, depending upon the date of entry, on the ground that the fabric surface had a "nap," not a "pile" and hence was a "napped" rather than a "pile" fabric. The importer protested, claiming that the structure of the cloth and the napping were sufficient to bring the goods within the classification of "pile fabrics."

The court found little difference between the terms "nap" and "pile," stating (pp. 670, 672):

> The terms "nap" and "pile" as applied to the result seem to be practically identical and such differences between the "hairiness" of "napped fabrics" and the "hairiness" of "pile fabrics", which the terms "nap" and "pile" seem intended to connote, are not fundamental differences in the product but in the method of production. Both terms designate a "hairiness" on the surface of woven fabrics which in some cases, as has been demonstrated at the instant trial, are so much alike that even an expert of 35 years' experience admitted that he could not be sure whether the cloth here in question was a "napped" or a "pile" fabric without an analysis.
>
> * * * * * * *
>
> This difference in the method of production is, as we have already outlined from our understanding of the conflicting testimony, that what is termed a "nap" or "napped fabrics" is produced by the *raising of some of the fibers of the threads* which compose the basic fabric, whereas the "pile" on "pile fabrics" must *be the raising at intervals, in the form of loops*, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an "uncut pile." These loops if cut then form a "cut pile." [Emphasis added.]

Although the testimony indicated that not all of the extra filling threads were raised by the napper, or cut, the court found, by virtue of the provision in the 1930 act covering pile "partly cut," that it

was unnecessary for all the extra threads to be so raised or cut. Concluding that the fabric in issue conformed to the requirements set forth in *M. J. Corbett & Co.* v. *United States*, *supra*, 26 Treas. Dec. 970, in that the goods were napped or teasled and had the weave structure described in the former case, the court held the cloth to be classifiable as pile fabric.

The decision of this court in *British & Irish Woolens Corp.* was affirmed in *United States* v. *British & Irish Woolens Corp.*, 22 CCPA 658, T.D. 47635 (1935). There, the appellate court, noting the testimony of some government witnesses that a "true" pile is made only by cutting the extra threads with a knife, and not by tearing them with a napper, stated (p. 663)—

> We find no authority which would seem to justify a holding that, as a matter of law, to create a true pile, a knife must be used for cutting the threads. If a *pile is actually created* it would not seem to be of any legal consequence what instrument is used in performing the cutting operation. [Emphasis added.]

The import of this decision is unmistakable: if a hairlike surface or nap is produced on the face of the cloth, then, regardless of how it was produced, the fabric meets one of the two requisites—the other being the specified pile weave structure—for classification as a pile fabric.

Applying these two criteria to *velveteen* fabrics, it is evident that they are not met *unless and until* the filling pile threads have been cut to form the pile on the surface of the fabric. Thus, the *Summary of Tariff Information, 1929*, states in part (p. 1572):

> * * * Technically, pile fabrics are divided according to method of construction into two classes: (1) Filling piles, such as velveteen and corduroy, and (2) warp piles, such as velvet, plush, and terry-woven fabrics. In all cases the foundation fabric requires its own set of warp and filling threads, and the pile, whether warp or filling, is made from an additional set of threads. *Filling pile is always cut*, whereas warp pile may be either cut or loop (uncut). [Emphasis added.]

Similarly Vol. 9 of the *Summaries of Tariff Information, 1948*, prepared by the Tariff Commission in response to a directive from the Ways and Means Committee [14] to "rewrite or otherwise bring up to date * * * the commodity summaries of tariff information," describes cotton velveteens as [15]—

> * * * filling-pile fabrics in which part of the filling *is cut to form a pile* which spreads uniformly *over the entire surface of the fabric.* * * * [Emphasis added.]

[14] Resolution of July 25, 1947 referred to in *Summaries*, Vol. 9, p. III.
[15] Id. at p. 70.

It is also significant that Vol. 13 of the *1948 Summaries* states, in the section on rayon pile fabrics (p. 66):

> Pile fabrics differ from other woven fabrics in having their surface covered in whole or in part by *short projecting ends* or loops. Fabrics distinguished by a *wholly cut pile* have their surface *covered with short erect threads*, the height of which is one-seventh of an inch or less in velvets and over one-seventh of an inch in plushes. Fabrics characterized by a *wholly uncut pile* have their surface *covered with small loops*. Those with a *partly cut pile* are mainly jacquard-figured goods and other novelties wherein patterns are worked out by a *combination of erect pile and loop pile*. [Emphasis added.]

And in the section of the *1948 Summaries* on wool pile fabrics (Vol. 11, Part 2, p. 49) the following is stated:

> Pile fabrics consist of foundation or ground fabrics *on which the pile is formed by short projecting yarn-ends* (*if cut pile*) *or loops* (*if uncut pile*). The pile, made from an extra set of yarns, may consist either of filling yarns, as in corduroy, or of warp yarns, as in plush, frieze, and Astrakhan. *Filling pile is always cut;* warp pile may be cut, partly cut, or uncut. [Emphasis added.]

We cite the *1948 Summaries*, not as evidence of legislative intent in enacting the pile fabric provisions in the Tariff Act of 1930, but as demonstrating a consistency over many years in the treatment and understanding of the term "pile fabrics" by the Tariff Commission which has been periodically charged by Congress with the responsibility of preparing the commodity surveys and summaries upon which the latter has relied in revising the tariff statutes.

Turning now to the Tariff Schedules of the United States and the provisions in issue, we are unable to discern any intent in the revised tariff schedules adopted under the Tariff Classification Act of 1962 to change the understanding of the term "pile fabrics" as expressed in the foregoing legislative history and judicial decisions.[16] We find rather that the heading in question incorporates the previously defined standards for classification of pile fabric: (1) construction, i.e., insertion or knotting of the intended pile (extra warp or filling thread) in the fabric during the weaving or knitting, and (2) a pile effect or formation which at least partly "covers the * * * surface" and which may be wholly or partly cut or not cut (in loops).

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[16] The *Tariff Classification Study—Explanatory and Background Materials, Schedule 3* (Nov. 15, 1960) merely indicates an intent to consolidate all of the pile fabric provisions with some minor rate changes. It states (p. 129):

> Items 346.05 through 346.65 cover pile fabrics, that is, fabrics in which the pile was inserted or knotted during the weaving or knitting, whether or not the pile covers the entire surface, and whether the pile is wholly or partly cut or is not cut. The only rate changes involved in connection with pile fabrics are those reflected in item 346.35 covering velvets, plushes, and velours, all of which have been brought together at the single rate of 35 percent ad valorem. These products are closely related and differ significantly only as to the height of the pile.

Therefore, in light of these standards, unless or until the pile picks or filling floats of an uncut velveteen greige cloth are cut to form the pile on the face of the fabric, it is not a pile fabric within the ambit of the pile fabrics heading and is precluded from classification thereunder as "velveteen."

Beyond these considerations, we note that generally the definitions given in the lexicons and textile authorities comport with our understanding of the terms "pile," and "pile fabrics" and "velveteen" as used in the tariff schedules. Thus, in Hollen and Saddler, *Textiles* (3d ed., 1968), a source cited by defendant, the following appears at pp. 161–162:

> Pile fabrics are three-dimensional fabrics that have yarns or fibers forming a dense cover of the ground fabric. * * *
>
> * * * * * * *
>
> Woven pile fabrics are three-dimensional fabrics made by weaving into the basic structure an extra set of warp or filling yarns to make loops or cut ends on the surface. Pile fabrics are classified by the set of yarns used to form the pile, as filling pile and warp pile fabrics. (See Figure 19–2.)
>
> Filling Pile Fabric
>
> This fabric is made with three sets of yarns. An extra set of filling yarns forms the pile. During weaving, extra yarns float across the ground weave. In *corduroy*, the floats are arranged in lengthwise rows; in *velveteen*, they are scattered over the base fabric. The floats are cut by a special machine consisting of guides that lift the individual floating yarns from the ground fabric and of revolving knives that cut the floats. (See Figures 19–3 and 19–4.) * * * [17]

Also noted are the following definitions cited by defendant, from *Webster's Third New International Dictionary* (2d ed., 1963):

> *pile* – a mass of raised loops or tufts covering all or part of a fabric or carpet that is formed by extra warp or weft yarns during the weaving and that produces a soft even compact furry or velvety surface.
>
> *velveteen* – a clothing fabric usu. of cotton in twill or plain weaves made with a short close weft pile in imitation of velvet.

Turning now to the merchandise in issue, the court has examined plaintiff's exhibit 1 to determine if it has a pile within the meaning of the tariff schedules.[18] We find, despite the testimony of defendant's witness Gray, no evidence of a "pile," that is, raised short ends or loops projecting from the ground fabric—only uncut, flat filling floats which lie horizontally on and are interlaced with the ground weave.

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[17] Fig. 19–4 is a diagram of a machine for cutting corduroy.

[18] It is by now "axiomatic" that samples are potent witnesses.

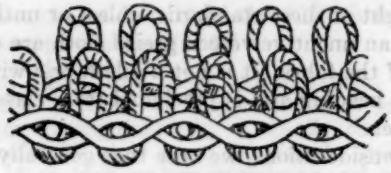

Fig. 19–2. Woven pile fabric.

Fig. 19–3. Filling pile. Floats are cut.

Inasmuch as the imported merchandise lacks the requisite pile formation on its surface, it is not a "pile fabric" nor, to be more specific, a "velveteen" as provided for in item 346.15, TSUS.

In view of our holding, we need not reach the second issue raised by plaintiff, namely, whether the imported fabric has a velveteen construction.

For the above reasons, it is concluded that the merchandise in issue is properly classifiable under item 320.14, as claimed by plaintiff. Judgment will be entered accordingly.

(C.D. 4671)

J. C. PENNEY PURCHASING CORPORATION *v.* UNITED STATES

Ladies wearing apparel

JACKET, SWEATER AND PANTS SETS—ENTIRETIES

Imported ladies wool knit and suede outfits consisting of jackets, shells (sweaters) and pants were classified as separate items, the jackets being classified under item 791.75 as wearing apparel of leather, while the woolen shells and pants were classified under item

382.58 as other women's wearing apparel, not ornamented, of wool, knit. The importer, alleging that the jacket, shell and pants were ladies pant suits, claimed that the articles were entireties properly classifiable under item 791.75 as wearing apparel in chief value of leather. The evidence showed that the importations were designed, purchased, imported and invoiced as a unit; that the three pieces were coordinated or matched as to color and matched as to size; that the merchandise was advertised to retail customers as a set and was so sold at retail; that the set was never broken up and the items sold separately; and that defective sets were disposed of by salvage or donated to a church or charity. *Held*: Based upon the facts presented, the imported sets were entireties for tariff purposes. See *Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, C.A.D. 894 (1966); *The Nissho American Corp.* v. *United States*, 64 Cust. Ct. 378, C.D. 4005 (1970); *A. N. Deringer, Inc.* v. *United States*, 71 Cust. Ct. 103, C.D. 4482 (1973); *W. T. Grant Co.* v. *United States*, 74 Cust. Ct. 3, C.D. 4579 (1975). However, plaintiff has only established its claimed classification with regard to one of the two types of the imported suits; it has failed to prove that the component material of chief value of the other type was leather. Therefore, the action is sustained only in part.

COMPONENT MATERIAL OF CHIEF VALUE

The proper method of determining the chief value of the importations is to ascertain the costs of the separate component materials at the time when they have reached the state when nothing further need be done to them except combine them into the completed article.

COMPONENT MATERIAL OF CHIEF VALUE

In computing the component material of chief value, labor performed on the individual component materials prior to combination into the completed article is considered as part of the component's value. Further, the costs of any processing done on component materials to permit their uniting with other materials in manufacturing an article are attributable to the material and must be considered in determining the component material of chief value. However, costs incurred in uniting the materials into the finished article are not considered in the chief value computation.

Court No. 74-3-00848

Port of San Francisco

[Judgment for plaintiff in part.]

(Decided November 2, 1976)

John B. Pellegrini for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

MALETZ, Judge: This case involves ladies wearing apparel invoiced as "Ladies knit suits" which consists of three components:

a jacket, a shell (sweater) and a pair of pants. The importations, which were in two distinct styles, identified as style 200 and style 7205, were entered at the port of San Francisco in September 1973.

At liquidation, each of the three components was appraised and classified by the government as a separate article.[1] In this connection, all the jackets were classified under item 791.75 of the Tariff Schedules of the United States, as modified by T.D. 68–9, as wearing apparel of leather, not specially provided for, and assessed duty at the rate of 6 percent ad valorem. The shells and pants were classified under item 382.58, as modified by T.D. 68–9, as other women's wearing apparel, not ornamented, of wool, knit, and assessed duty at the rate of 37.5 cents per pound plus 20 percent ad valorem.

Plaintiff claims the three articles (jackets, shells and pants) forming style 200 "suits" as well as the three articles forming style 7205 "suits" are entireties in chief value of leather and therefore properly classifiable under item 791.75 as wearing apparel of leather dutiable at the rate of 6 percent ad valorem.

Against this background, two issues are presented. The first is whether the importations are entireties for tariff purposes. Second, if the articles are held to be entireties, the court must then determine the component material of chief value since the claimed provision, item 791.75, is a chief value provision.

The pertinent provisions of the Tariff Schedules of the United States are as follows:

GENERAL HEADNOTES AND RULES OF INTERPRETATION

* * * * * * *

9. Definitions. For the purposes of the schedules, unless the context otherwise requires—

* * * * * * *

(f) the terms "of", "wholly of", "almost wholly of", "in part of" and "containing", when used between the description of an article and a material (e.g., "furniture of wood", "woven fabrics, wholly of cotton", etc.), have the following meanings:

(i) "of" means that the article is wholly or in chief value of the named material;

* * * * * * *

[1] The question of the proper appraised values is not presently before the court since this issue has been severed. See *Pretrial Memorandum*, Oct. 9, 1975.

SCHEDULE 3. – TEXTILE FIBERS AND TEXTILE PRODUCTS

* * * * * * *

PART 6. – WEARING APPAREL AND ACCESSORIES

* * * * * * *

Subpart F. – Other Wearing Apparel

Subpart F headnote:

1. This subpart covers only wearing apparel, not specially provided for, of textile materials.

* * * * * * *

Other women's, girls', or infants' wearing apparel, not ornamented:

* * * * * * *

Of wool:

Knit:

* * * * * * *

Other:

* * * * * * *

Valued over $5 per pound:

* * * * * * *

382.58	Other	37.5¢ per lb. + 20% ad val.

SCHEDULE 7. – SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

* * * * * * *

PART 13. – PRODUCTS NOT ELSEWHERE ENUMERATED

* * * * * * *

Subpart B. – Articles of Fur and of Leather

Subpart B headnote:

1. For the purposes of the tariff schedules (except part 5A of schedule 1)—

(a) the term "leather" includes "leather", as defined in headnote 1(a), part 5A, schedule 1, and also includes rawhide, parchment, and vellum.[2]

* * * * * * *

[2] Headnote 1(a), part 5A, schedule 1, reads:

1. For the purposes of this subpart —

(a) the term "leather" covers leathers made from hides and skins of all animals (including birds and fish); * * *

	Wearing apparel not specially provided for, of leather:	
	* * * * * * *	
791.75	Other	6% ad val.

A representative sample of style 200 (plaintiff's exhibit 3) demonstrates that it consists of a lined rust-colored pigskin suede blazer jacket with contrasting beige-colored piping. The piping outlines the collar, the buttonholes, the tabs on the sleeves, and forms a "T" design on the patch pockets. The jacket also has a double row of decorative beige saddle stitching which extends around the perimeter, down the outer seam of the sleeves and around the two patch pockets and a breast pocket. The shell is a mock-turtle one made of ribbed wool, while the pants are cuffed and bell-bottomed and made of a flat wool knit weave. Both the shell and the pants are dyed to match the piping and stitching on the jacket.[3]

Style 7205 (plaintiff's exhibit 4) consists of a blue wool knit shirt-type jacket with matching blue lamb-suede. This lamb-suede is used to form: two front panels each of which has two flap pockets; a yoke in the back; a button-down wrist tab; and a buckle-belt. The shell and the pants are dyed to match the jacket and are of the same style as the shell and pants of style 200.[4]

At the trial plaintiff called four witnesses[5] and offered eight exhibits in evidence. The defendant did not call any witness but offered eight exhibits in evidence.

The Entireties Question

With respect to the issue of entireties, the following facts appear: In June 1973, the plaintiff J. C. Penney Purchasing Corp. entered into two contracts with the Fortune Knitting Factory of Hong Kong (hereafter referred to as "Fortune"). The first contract provided for the sale of (1) 4,000 sets of style 200 suits, which were referred to as "Ladies' 3-pce. pig skin blazer woolen pants suit," at the unit price of $38.00 per set and (2) 2,800 sets of style 7205 suits, which were referred to as "Ladies' 3-pce. suede trim jacket pants suit," at the unit price of $28.00. The second contract provided for the sale of 1,000 sets of style 200, which were referred to as "Ladies' 3-pce. pig skin blazer woolen pants suit," at the unit price of $39.00 per set. Both contracts provided for color and size distribution, quality controls, labelling, shipping and invoicing.

[3] Style 200 also comes in a navy jacket with red trim, a red shell and red pants, and a brown jacket with matching camel-colored trim, shell and pants.

[4] Style 7205 also comes in beige, loden green and rust.

[5] Three of the four witnesses were employed by the J. C. Penney Company, Inc. as buyers, directors or advisers in the field of ladies fashion apparel.

The packing instructions in both contracts required "[e]ach set to be flat packed in heavy polybag and 24–30 sets in a seaworthy shipper." In accordance with these instructions, each of the imported three-piece "sets," consisting of a matching jacket, shell and pants, was shipped as a single unit in a heavy polybag envelope.

Both style 200 and style 7205 were designed by Penney's ladies suit buyer. The genesis of style 200 was a pigskin blazer jacket which was sold as a separate item of apparel at the Saks Fifth Avenue department store in New York City. The Penney buyer sent a sample of this blazer to its manufacturer, Fortune, with instructions to modify the design of the jacket by adding contrasting piping, saddle stitching and buttons, and to coordinate the trim on the jacket with a sleeveless turtleneck shell (sweater) and a pair of slacks all made to prescribed specifications. The colors on the shell and slacks were to be dyed to match the trim of the jacket thereby coordinating the unit as a three-piece suit.

The genesis of style 7205 was a two-piece wool knit pant suit with a suede front which was purchased by a Penney buyer at the Franklin Simon department store in New York City. The sample was sent to Fortune with instructions to produce the suit as a three-piece pant suit by adding a wool shell or sweater. The wool in the jacket, sweater and pants was to be dyed in the same lot and vat, while the suede was also to be dyed to match.

The Penney retail price for style 200 was $89.00, while style 7205 retailed for $65.00. Both three-piece styles had to be ordered and reordered as a unit by the individual Penney store. The component parts of these sets were never intermingled with any garments sold as separates or coordinates in the Penney stores. Furthermore the policy of the Penney company required that these garments be sold as units, that is a size 14 jacket had to be sold with a size 14 shell and pants. Thus, if a customer came in with a size problem—i.e., requiring a size 14 jacket or shell with a size 16 pants—the store was not allowed to break up the set to fit the customer. This policy—that the set must be sold as an entirety—was never violated.

In those instances when a Penney store had not sold its entire stock of the imported pant suits and there were leftovers, it reduced the price. If the suits did not sell at the reduced price, the store manager asked for permission from the Penney buyer to return the leftover suits to New York. If a set had a defect in the jacket, shell or pants, the normal practice was for the store to return the entire set to New York or to Penney's Buena Park warehouse in California. If the defect was minor, it was repaired and the set was sold as a unit in Penney's retail associate store in New York City. Otherwise, defective returned sets were disposed of by salvage or donated to churches or charities.

The imported sets were advertised as suits. In the Penney stores, they were displayed on a circular rack or a T-stand and were offered for sale assembled on one hanger as a three-piece set and priced as a three-piece set.

The record indicates that a ladies suit, including a pant suit, is a garment designed as "a multi-piece woman's apparel sold as a unit with a common size"; it is a preconceived outfit which consists of two or three or more components of the same size which are always sold as a unit.

In contrast to suits, coordinates are separate items that can be mixed and matched and worn together. Coordinates are preconceived as to style and color and present a multiple of coordinated choices for the wearer. However, since coordinates are separates, each component can be purchased in a different size.

Unlike coordinates, the imports were already fully coordinated; in other words, in the case of the suits, the decision has been made for the consumer who needed only select her color and her size without going to the trouble of shopping around to find separate components to make a coordinated outfit.

The importations were purchased by the ladies suit buyer who was in charge of subdivision 265 at Penney. The buyer in this subdivision does not have the authority to buy these components as individual articles; rather, his jurisdiction is limited to buying and selling sets only.

It is to be added that sweaters and pants identical or substantially similar to those used in the imported sets could have been purchased as separates at other stores in the United States during the years 1973 through 1975.

With these facts in mind, we now consider whether the importations are entireties for tariff purposes. The question as to whether two or more components shipped together are to be considered an entirety for tariff purposes and thus assessed duty as one complete article is one that is "fraught with much difficulty." Sturm, *A Manual of Customs Law* (1974) p. 289. The extent of these difficulties was expressed in *Charles Garcia & Co., Inc.* v. *United States*, 45 CCPA 1, 2, C.A.D. 663 (1957) as follows:

> Because of the different situations which are encountered involving the scope of individual tariff terms, meanings of particular words, evidences of legislative intent, and the existence of administrative practice and prior judical decisions, analogies are not only difficult to find in the field of entireties, but are of uncertain reliance in view of the variances which may be encountered in the factors mentioned.

In general, an article is regarded as an entirety when the joined components form a new article which possesses a character or use

different from that of any of its parts, or when one of the elements of the component is predominant, the other parts being merely incidental to the predominant part. See Sturm, *id.* at 288.

Such rules notwithstanding, the determination of an entireties issue presents many problems as pointed out by the court in *Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, 15, C.A.D. 894 (1966):

> The difficulty which is experienced in this type of case is not so much the formulation of a workable rule as it is the application of the provisions thereof to a given factual situation. Where it is apparent that the components of an importation have no useful function until joined into a single entity, it is, course, relatively easy to say that the result constitutes an entirety. Where, however, the several components of a unit are to any extent alone susceptible to a separate use, the question of whether their individual identities are subordinated to the newly created entity is not so readily answered.

In determining whether an importation is an entirety the actual nature of the imported commercial entity must be the determining factor. As our appellate court noted in *Altman & Co.* v. *United States*, 13 Ct. Cust. Appls. 315, 318, T.D. 41232 (1925):

> * * * [I]f an importer brings into the country, at the same time, certain parts, which are designed to form, when joined or attached together, a complete article of commerce, and when it is further shown that the importer intends to so use them, these parts will be considered for tariff purposes as entireties, even though they may be unattached or inclosed in separate packages, and *even though said parts might have a commercial value and be salable separately.* [Emphasis added.]

More specifically, so far as the present case is concerned, recent decisions have held that multiple components of wearing apparel were entireties for tariff purposes when certain guidelines or criteria were satisfied. Thus, in *Miniature Fashions, Inc.* v. *United States*, *supra*, 54 CCPA 11, the court held that certain cabana sets which consisted of shirts and shorts were entireties. In so holding the court noted the following: the sets were designed as a unit; they were matched as to color, print and fabric; they were imported as a unit; they were pinned together; they were invoiced as a unit; they were sold as a unit; the individual components of the set had no commercial value except as part of a unit; and individual components of the set were not resold as individual articles.

To similar effect is the decision in *The Nissho American Corp.* v. *United States*, 64 Cust. Ct. 378, C.D. 4005 (1970), *appeal dismissed*, 57 CCPA 141 (1970) which concerned the question as to whether boys flannel shirts and corduroy pants called shirt and longie sets were entireties. The court held that the shirts and pants were entireties stating (64 Cust. Ct. at 381–82):

> The record thus establishes that the shirt and longie set herein was designed, purchased, imported, and invoiced as a unit. The two pieces were matched as to color, print and fabric. The merchandise was advertised to retail customers as a set and was so sold both at wholesale and at retail. It was never broken up and the items sold separately. If returned by a customer, it would be resold as a set or if defective, destroyed or given to charity. *While the shirt portion is a shirt and the trouser portion trousers and the ultimate consumer may use them separately with other trousers or slacks, it is clear that they were designed and merchandised as a set to be worn together.* [Emphasis added.]

Also, in *A. N. Deringer, Inc.* v. *United States*, 71 Cust. Ct. 103, C.D. 4482 (1973) the court found that certain "bra-kini" sets consisting of a brassiere and bikini pants were entireties. In reaching this conclusion, the court considered the following factors determinative: the articles were designed to be worn together; they were sold in sets; and they were displayed in sets. See also *W. T. Grant Co.* v. *United States*, *74* Cust. Ct. 3, C.D. 4579 (1975).

Turning now to the present case, an examination of plaintiff's exhibits 3 and 4 clearly reveals that the components of both of the imported pant suits are coordinated in a manner which creates a complete outfit. With respect to style 7205, plaintiff's exhibit 4, the three components of the suit are the same color, care having been taken to match the color of the leather and wool materials and each item incorporates a wool knit fabric. In style 200, plaintiff's exhibit 3, the color of the piping, trim, and buttons of the jacket, all of leather, match the color of the knitted shell and pant components. Again, special care was taken to ensure that the color match was as close as possible.

The purchase contracts covering the merchandise at issue clearly demonstrate that the suits were purchased by plaintiff as sets.

The official papers show that the imported suits were invoiced, packed and imported as sets. In fact the only reason the invoices listed separate values was to satisfy a request of the Customs Service. The testimony shows that the suits were packed as sets; this is corroborated by the representative polybags in which the subject pant suits were shipped as a unit as required by the sales contract.

As we have seen, style 200 was advertised as a set and both styles 200 and 7205 were sold at retail as sets. The suits were not broken up to accommodate a customer with a size problem and they were displayed in the retail stores as sets. The record also demonstrates that those of the imported suits which were not salable because of defects in one or more of their components were returned as sets and were not broken up and sold as separate articles.

The testimony shows further that the jacket in style 200 and the shells and pants in both pant sets could be worn individually or in combination with other articles and that articles of wearing apparel

similar to the components of the subject suits are sold separately. This, however, does not preclude the imported articles from being classified as entireties. As the court made clear in the *Altman* case, *supra*, 13 Ct. Cust. Appls. at 318, an article may be an entirety "even though * * * [the] parts might have a commercial value and be salable separately." Likewise in *Nissho American*, *supra*, this court held that the sets therein involved were entireties even though the ultimate consumer may use components of the shirt and longie sets separately with other trousers or slacks (64 Cust. Ct. at 382) and "even though it is possible to wear the items separately." *Id.* at 383.

In summary, it is noted that the subject suits were designed, purchased, imported and invoiced as a unit. The three pieces were coordinated or matched as to color and matched as to size. The merchandise was advertised to retail customers as a set and was so sold at retail. It was never broken up and the items sold separately. If returned by a store, it would be resold as a set, or if defective, disposed of by salvage or donated to a church or charity. In light of the above, it must be concluded that the imported suits are entireties for tariff purposes.

The defendant has cited an exhaustive list of cases to establish its contention that the importations are not entireties; however, only one such case deals with wearing apparel. In that case, *United States* v. *Schoen & Co., Inc.*, 20 CCPA 370, T.D. 46133 (1933), certain embroidered blouses and certain silk skirts, which were matched in color but were not designed to form a complete article of commerce, were not used as such by the importer, were separately invoiced and were offered for sale separately, were held dutiable by the court under the separate provisions of law applicable to each article rather than as entireties.

The present case, however, is clearly distinguished from *Schoen* upon its facts since the imported jackets, shells and pants were designed, invoiced, and offered for sale as a unit or one complete article of commerce thus putting it squarely in point with the previously cited *Miniature Fashions*, *Nissho American*, *A. N. Deringer*, and *W. T. Grant* cases.

Defendant further contends that since the duty on wearing apparel of man-made fibers and wool is higher than the rate on wearing apparel made of other materials it would circumvent the intent of Congress to have the shells and slacks which are wool wearing apparel reliquidated as wearing apparel of leather. In this case, however, we find the converse to be true since it was the intent of Congress to create a separate classification for leather wearing apparel. Thus a three-piece suit, meeting the criteria for an entirety, comprised of wool and leather, but in chief value of leather, must be classified as leather wearing apparel. Indeed, it would be inconsistent with the

intent of Congress to classify it otherwise. See *Miniature Fashions, Inc.* v. *United States, supra*, 54 CCPA at 18.

In view of all these considerations, we find that the importations are entireties and turn our attention to the remaining issue of the component material of chief value.

Component Material of Chief Value

Inasmuch as General Headnotes and Rules of Interpretation, headnote 9(f)(i) states that the term "of" when used between the description of an article and a material means that the article is wholly or in chief value of the named material, it was plaintiff's burden, in order to establish its claim under item 791.75, to prove that the component material of chief value of the imported suits is leather. See *A. N. Deringer, Inc.* v. *United States*, 59 Cust. Ct. 148, C.D. 3101, 272 F. Supp. 987 (1967); *Broadway-Hale Stores, Inc.* v. *United States*, 63 Cust. Ct. 194, 198, C.D. 3896 (1969).

The proper method of determining the chief value of these importations is to ascertain the costs of the separate component materials at the time when they have reached the state when nothing further need be done to them except combine them into the completed article. *United States* v. *Jovita Perez*, 44 CCPA 35, 39, C.A.D. 633 (1957).

In computing the component material of chief value, labor performed on the individual component materials prior to combination into the completed article is considered as part of the component's value. *Pico Novelty Co., Inc.* v. *United States*, 62 Cust. Ct. 341, 344, C.D. 3759 (1969). Further, the costs of any processing done on component materials to permit their uniting with other materials in manufacturing an article are attributable to the material and must be considered in determining the component material of chief value. However, costs incurred in uniting the materials into the finished article are not considered in the chief value computation. *Swiss Manufactures Association, Inc.* v. *United States*, 39 Cust. Ct. 227, 233, C.D. 1933 (1957), *appeal dismissed*, 45 CCPA 129 (1958).

An examination of the samples makes it clear that leather and wool are the only possible components of chief value.[6] In this setting, plaintiff presented the testimony of V. L. Chen, the manager and a partner of Fortune, the manufacturer of the importations, to establish that leather was the component material of chief value for the imported suits. Chen testified that he was personally familiar with the costs of the various materials for styles 200 and 7205 since he was responsible for purchasing the materials that went into their production. He also testified that he was personally familiar with the type and quantity of the materials used in their production and with the processing and processing costs of these materials. Further,

[6] It is obvious that the other materials such as button blanks, rayon interlining, cotton thread and zippers would not be of such value as to be the component material of chief value.

Chen testified that under his supervision a cost breakdown for styles 200 and 7205 was prepared by the firm's accountant in 1974 from Fortune's manufacturing and purchasing records covering May and June 1973 when the materials for the importations were purchased.[7] This cost breakdown is included in evidence as plaintiff's exhibit 7. Chen stated that he personally verified the data in plaintiff's exhibit 7 against the data in Fortune's books and records and that the records which formed the basis for this exhibit were prepared in the ordinary course of business.[8]

Style 200

With regard to the costing of style 200, the record demonstrates that the suede (leather) was purchased by Fortune from a Japanese firm at a cost of $0.55 (U.S.) per square foot plus $0.02 (U.S.) per square foot delivery and transportation charges.[9] Fortune kept a running inventory on the suede used in these jackets and had some stock on hand before the order for style 200 was signed. Fortune bought the suede in lots of 100,000 or 500,000 square feet which were composed of skins having an average width of 6 to 8 feet. While the actual cost of the suede leather for an individual jacket depended on the size of the garment, an average of 29 square feet was used at a cost of $16.53 (U.S.) per jacket.

In addition to the suede, there was a charge for "[l]eather for trimming" which covered the cost of the leather piping and the leather buttons. The leather used for piping and buttons was purchased in Hong Kong at a cost of $1.68 (U.S.) per foot and was specially dyed to match the wool portions of style 200.

The manufacturing steps involved in completing the jacket included cutting and sewing the leather parts together, sewing the trim, sewing in the lining, contrast stitching, and pressing. The cutting charges included cutting the suede, the lining and the interlining. The interlining was neither wool nor leather. The sewing charges included the contrast stitching and sewing the piping when the garment was sewed together. The pressing charges represented two pressings; one before cutting and one when the garment was finished.

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[7] The record shows that the prices for the materials in question did not vary in 1973.

[8] Citing 4 *Wigmore on Evidence* (3d ed. 1940) § 1230, pp. 434-35, defendant claims that actual documen recording the various costs should have been produced rather than testimony or a summary of their contents. It is noted, however, that with regard to voluminous documents, 4 *Wigmore on Evidence* (Chadbourn rev. 1972) § 1230, pp. 535-41 indicates that the convenience of trials demands that summaries of complicated, burdensome or voluminous original records prepared by competent individuals be offered in evidence as the only practicable way of recieving such proof. The most commonly recognized application of the principle stated above is that by which business transactions are allowed to be shown by schedule or summary. See also *Henry A. West, Inc.* v. *United States*, 68 Cust. Ct. 201, 203, C.D. 4361 (1972) which held that statements as to costs by a businessman who directly supervises and controls the company records can be received into evidence without requiring substantiation of his statements through the submission of his official records.

[9] The suede was valued in U.S. dollars since all Fortune's purchases from Japan were computed in U.S. dollars. For the sake of clarity (U.S.) appears after the numerals to denote U.S. dollars and (H.K.) appears after the numerals to denote Hong Kong dollars. In the period involved here—1973—a Hong Kong dollar was valued at $0.20 per U.S. dollar.

The shell portion of the suit was made of a flat hand-knit wool purchased from Japan at $1.80 (U.S.) per shell. The knitting charges were $1.20 (H.K.) per shell; loopwork charges, representing work done around the armhole of the shell, were $0.70 (H.K.) per shell; an average mending charge of $0.20 (H.K.) was included for every shell (even though not every shell required mending); there was a pressing charge of $0.25 (H.K.) after knitting and a drycleaning charge of $0.30 (H.K.) after the shell was completed.

The wool yarn used for the pants was also purchased by Fortune in Japan and came to $5.40 (U.S.) per pair (including dyeing and delivery charges). The pants were made of a machine circular knit at a knitting charge of $1.80 (H.K.) per pair. The cutting charges were $0.25 (H.K.) representing the per piece charge for labor. An average mending charge of $0.30 (H.K.) was entered as were pressing charges of $0.60 (H.K.) for pressing the yarn after it was made into piece goods and pressing the pants after completion.

In Summary, Chen's testimony and plaintiff's exhibit 7 indicate the following breakdown of the U.S. dollar costs properly included in a chief value computation for style 200:

Leather		Wool		
suede	$16.53	Shell:	wool yarn [10] (includes dyeing)	$1.80
leather trimming (including leather on buttons)	1.68		knitting charges	.24
suede cutting charges	.36			$2.04
pressing charges (before cutting)	.10	Pants:	wool yarn (includes dyeing)	$5.40
			knitting charges	.36
			pressing charges (when yarn made into piece goods)	.06
			cutting charges	.05
				$5.87
total:	$18.67	total:		$7.91

[10] According to Chen, the wool yarn, as indicated in plaintiff's exhibit 7, cost $3.60 (U.S.) per pound with ½ pound of wool used for each shell and 1-½ pounds used for each pair of pants. Chen further testified that

In computing the value of the leather, the cost of: the suede, the leather trimmings, the leather portion of the buttons, the pressing charges before cutting the suede, and the suede cutting charges were included. With regard to the cutting charges, plaintiff's exhibit 7 shows a figure of $5.50 (H.K.), i.e., $1.10 (U.S.). However, this charge includes the cutting not only of the suede but of the non-leather lining and interlining. Since the lining and interlining are neither leather nor wool, this entire charge cannot be attributed to the leather cost. In this circumstance, plaintiff has allocated one third of the total cutting cost, i.e., $0.36 (U.S.) to the cost of cutting the suede. The allocation of processing costs among component materials is permissible in determining component material of chief value. *N. Erlanger Blumgart Co., Inc.* v. *United States*, 62 Cust. Ct. 110, 114, C.D. 3691, 295 F. Supp. 278 (1969), *aff'd* 57 CCPA 127, C.A.D. 991 (1970). And in the present case one third appears to be a reasonable allocation, particularly in view of Chen's testimony that cutting the lining and the interlining was cheaper than cutting the suede.[11]

While the charges for pressing the suede before cutting are included in the cost of the leather, the charges for pressing after the jacket has been assembled do not figure in the chief value computation. Accordingly, one half of the pressing charges have been included in the computation for the value of the leather.

It is to be noted that the lining, interlining, and non-leather part of the buttons are not included in the chief value computation since they are neither wool nor leather. Similarly, the button sewing charges are not included since those charges are part of the final assembly process.

Nor are the sewing expenses incurred in completing the jacket, pants and shells includible in the chief value computation since they are expenses necessary to the assembly of the completed three-piece suit. See e.g., *United States* v. *Bernard, Judae & Co.*, 15 Ct. Cust. Appls. 172, T. D. 42231 (1927) where the cost of inserting bristles

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the undyed charge for this wool as purchased from Japan was about $3.50 (U.S.) per pound and the dyeing charge was $0.30 (H.K.) per pound. Defendant contends that these figures demonstrate a cost discrepancy and show that the dyed wool "in actuality cost $3.80 rather than $3.60 per lb." (Br. p. 69.) The difficulty with this contention is that the cost of the wool, i.e., $3.50 per pound, was expressed by Chen in *U.S.* dollars, whereas the dyeing charge, i.e., $0.30 per pound, was expressed by him in *Hong Kong* dollars. When it is considered (i) that the dyeing charge when translated into U.S. dollars was 6 cents per pound (since a Hong Kong dollar at that time equalled 20 cents (U.S.)); and (ii) that Chen approximated the charge for the undyed wool at "about $3.50" per pound (R. 168), the cost of $3.60 per pound (U.S.) as indicated by Chen is, under the circumstances, sufficiently close to the actual cost of $3.56 (U.S.) as to be within reason.

[11] With regard to the suede and wool portions of the imported sets, defendant argues that the evidence is conclusory because it is based on average amounts rather than a piece by piece breakdown. Defendant is apparently contending that a separate cost figure for each individual garment is necessary to establish chief value. However, in cases such as these, costing based upon averages is a reasonable way of determining what a manufacturer should charge for a garment, particularly when a major part of the garment is made from animal skins which by their very nature are irregular in size and quality and the average cost per garment is not based upon estimates or approximations, but on the actual expenses incurred by Fortune in the manufacture of the component parts of the merchandise before the court. See, e.g., *N. Erlanger Blumgart Co., Inc.* v. *United States*, *supra*, 62 Cust. Ct. 114; *Field & Co.*, v. *United States*, 7 Ct. Cust. Appls. 332, 336-37, T.D. 36876 (1916); *True Fit Waterproof Co.* v. *United States*, 7 Ct. Cust. Appls. 489, 492-93, T.D. 37107 (1917).

into the celluloid handles of brushes represented labor upon the brush and not upon a material, and the cost thereof was not permitted to be added to the bristles for the purpose of determining the component material of chief value. By the same token, the foregoing sewing expenses did not advance the value of the materials as materials and the charges therefor are not considered in determining the component material of chief value. In this connection, the distinction between costs attributable to component materials as opposed to those attributable to the article itself is clearly delineated in *Swiss Manufactures Association, Inc.* v. *United States, supra*, 39 Cust. Ct. at 233–34, as follows:

> What must be kept in mind in the distinction between manufacturing operations which advance the materials *as materials* and manufacturing operations which convert the materials into the complete articles. The law is well settled that the costs entering into bringing the materials to the state where they are ready to be united with the other materials in the manufacture of the article are attributable to the *materials* and are to be considered in the determination of component material of chief value, but the costs entering into the uniting of the materials to make the finished article are not to be considered in the determination of component material of chief value. *Turner & Co. et al.* v. *United States*, 12 Ct. Cust. Appls. 48, T. D. 39997; *C. H. Powell Co. et al.* v. *United States*, 64 Treas. Dec. 467, T.D. 46711. [Emphasis in original.]
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> * * * * * * * * * * * * * * * the values of the single or separate component materials must be taken as of the time each one is ready to be united with the other materials in the manufacture of the article. * * *

In light of the foregoing, we find the value of the leather, including both material and processing costs, is $18.67.

The shell and pants of style 200 are both of wool. The value of the wool includes the cost of the wool yarn, and the knitting charges. The sewing, looping, mending and drycleaning charges are not included, since those charges do not constitute processing of the wool material, but rather were for finishing the shell and/or pants, or were performed after the articles were complete.

The sewing work on the shell (which, as previously noted, is hand-knit) was performed to put in the zipper, while the sewing work on the pants was done to join the various knit piece goods which form the pants. The looping charges were incurred in finishing the armhole of the shell, while the mending and drycleaning charges were for work performed after the shell and pants had been completed. None of the charges for the foregoing work is includible in determining component

material of chief value since the work involved did not advance the materials as materials.

The pressing charges for the pants represent two separate pressing operations, one which takes place after the wool yarn is made into piece goods, while the other is performed after the pants are completed. Since only the first pressing affects the wool as a material, it is reasonable to allocate one-half of the total pressing charge or $0.06 (U.S.) for the pants in computing the value of the wool material.

The cutting charges for the pants are included in chief value since this is work performed on the material itself.

Neither the zipper material in the shell and pants nor the elastic waistband in the pants is made of wool or leather and hence is not considered.

In sum, the total value of the wool in the shell and pants—which value includes the material and processing costs—totals $7.91. Since, as previously indicated, the total value of the leather is $18.67, the necessary conclusion is that style 200 is in chief value of leather, as claimed by plaintiff.

Style 7205

The testimony of the witness Chen as to style 7205 indicated that each jacket required 12 square feet of lamb-suede when averaged out over a large number of garments and that the cost of the suede was $0.75 (U.S.) per square foot (which included a freight charge of $0.05 (U.S.)) or a total cost per jacket of $9.00 (U.S.). The suede was purchased in the United States where it was bought by the skin, the average width of which was between 4 to 6 feet. According to Chen, although the two panels on the front of the jacket are only 6 inches wide, they cannot be cut out of one width of lambskin despite the fact that the lambskin can be cut lengthwise or crosswise. Chen testified that the cutting charge for the suede in the jacket was $3.50 (H.K.) or $0.70 (U.S.). The interlining on the jacket was either cotton or polyester, while the knitting was of a circular machine type which cost $0.58 (H.K.) per pound. Chen further testified that sewing charges of $1.50 (U.S.) were incurred for: sewing the suede to make the panels; sewing buttonholes; and sewing the jacket together. As in the case of style 200, he stated that there were two separate pressings, the first before cutting, the second after the jacket was finished.

With regard to style 7205, plaintiff contends that Mr. Chen's testimony and plaintiff's exhibit 7 indicate the following breakdown of those U.S. dollar costs which are properly considered in a chief value analysis of that style:

Leather		Wool		
Sheep-suede material	$9.00	Jacket:	wool yarn	$1.80
			cutting charges	.04
cutting charge for suede parts	.70		knitting charges	.12
			pressing charges	.02
pressing charges	.06			$1.98
		Shell:	(same as style 200)	2.04
charge for sewing suede parts together	.60			
		Pants:	(same as atyle 200)	5.87
total:	$10.36		total:	$9.89

Chen testified that the value of the leather in the jacket component of style 7205 includes the value of the lambsuede, the charges for cutting the suede and pressing it prior to cutting, and the charges for sewing the suede pieces together to make panels which were joined with the wool to produce the jacket. The figures he presented show that Fortune allocated the various processing and finishing costs incurred in producing the jacket between leather and wool on an 80–20 percent basis, with 80 percent for leather and 20 percent for wool.

Plaintiff contends that since the sewing charges for the jacket include sewing the jacket together as well as sewing the suede pieces together to make the panels, an allocation of the charges of sewing the suede must be made. Citing *Swiss Manufactures Association, Inc.* v. *United States*, *supra*, 39 Cust. Ct. at 234, plaintiff states that the joining of the leather pieces together is properly part of the value of the leather component material since until the panels are created, the leather is not ready to be united with the wool to form the jacket. With regard to the balance of the sewing charges for sewing the jacket together (i.e., sewing the leather panels and wool pieces together), plaintiff claims these are clearly assembly charges and, therefore, not part of the chief value computation. On this aspect plaintiff further contends that the sewing charges should be allocated on the basis of 80 percent to the leather part of the jacket and 20 percent to the woolen part. It then asserts that if this 80 percent is further allocated between (1) the sewing necessary to make the suede panels and (2) the sewing of the leather panels and wool pieces together, 40 percent or $0.60

(U.S.) of the total jacket sewing charge of $1.50 (U.S.) is attributable to preparing the suede panels.[12]

It is in these contentions that plaintiff has failed in its attempt to prove that the component material of chief value in style 7205 was leather. For while it is clear

> * * * that the value of the materials should be determined as of the time when they had reached such a condition that nothing remained to be done upon them by the manufacturer except putting them together, there still remains open in each case that may arise the determination of the question as to whether or not that stage has or has not been reached, and this is the precise issue here. [*United States* v. *Meadows*, 2 Ct. Cust. Appls. 143, 146, T.D. 31665 (1911).]

With this consideration in mind, plaintiff claims the suede panels are not ready to be united with the wool to form the jacket until such time as the suede pieces are sewn together. In this circumstance, the $0.60 (U.S.) sewing charge which plaintiff would add to the value of the suede leather for sewing such pieces together is of major importance in determining the component material of chief value for without this charge the total cost of the leather would be $9.76 rather than plaintiff's claimed value of $10.36 and thus the wool which is valued by plaintiff at $9.89 would be the component material of chief value.

There is some difficulty in determining when materials have reached a condition where nothing remains to be done by the manufacturer except putting them together. Here we are concerned with three-piece pant suits composed of a jacket, a shell, and a pair of slacks. In computing the component values of *style 200* the component materials were considered by plaintiff to be ready to be united to form the three-piece unit when the woolen and leather portions were fully processed and cut and were ready to be sewn or assembled into the respective jacket, slacks and shell which comprised the three-piece suit. Thus, in the case of style 200 there were no sewing charges included for the leather jacket such as charges for sewing the pieces of suede together to make the pockets, the leather collar and the leather tabs. Similarly, there were no sewing charges for sewing the woolen portions of the style 200 outfit together, such as joining the various knit piece goods which formed the slacks and the shell.[13]

In the case of style 7205, however, plaintiff adopts a different approach. Thus, in contrast to style 200, it includes the charge of $0.60 (U.S.) for sewing the suede pieces together but totally ignores the

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[12] There is no indication or explanation as to how plaintiff arrived at this 40 percent figure nor is there any evidence in the record to support it.

[13] Had these sewing charges been included for both the leather and woolen portions of style 200, the record indicates that the value of the leather vis-a-vis the value of wool would have been even larger than that actually claimed.

charges for sewing the woolen pieces together, such as sewing together the various pieces of wool to make the collar, the front and back of the jacket, and the sleeves. Had plaintiff made a computation for style 7205 consistent with its style 200 computation, it would *not* have included the amount of $0.60 for sewing the suede pieces together—this on the basis that it considered the component materials for style 200 as fully processed and cut when they were ready to be united to form the woolen and leather portions. However, if the $0.60 charge is properly includible in determining the value of the leather in style 7205 then it was incumbent upon plaintiff also to include the charges for sewing together the *wool* pieces of that suit so that a proper comparison could be made between the total value of the leather and the wool portions of the suit. In other words, by including in style 7205 the sewing charges for the suede pieces, while at the same time ignoring the sewing charges for the *woolen* pieces, plaintiff would have it both ways. And this the court cannot permit.

In sum, we must conclude that the $0.60 sewing charge is not part of the value of the leather material of style 7205. We therefore hold that the value of the leather material for style 7205 is $9.76 ($10.36 less $0.60) while the value for the woolen material is $9.89. Accordingly, the component material of chief value of style 7205 as an entirety is wool.

In view of the foregoing, plaintiff's claim with regard to style 200 is sustained, but with regard to style 7205 is overruled. Judgment will be entered accordingly.

(C.D. 4672)

IMPERIAL PRODUCTS, INC. *v.* UNITED STATES

Cloth brush heads

Court No. 72-11-02357

Port of Minneapolis

[Judgment for plaintiff.]

(Decided November 5, 1976)

Stein and Shostak (*Marjorie M. Shostak* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Robert B. Silverman*, trial attorney), for the defendant.

FORD, Judge: Pursuant to rule 8.2 of the rules of the court, plaintiff has moved for summary judgment. Defendant has filed

opposition thereto on the ground that the following issues of fact are subject to trial:

(1) Was such or similar merchandise freely sold to other purchasers?

(2) Did the price at which such or similar merchandise was freely sold to other purchasers include the royalty fee incurred by plaintiff herein?

(3) Did the price at which such or similar merchandise was freely sold to other purchasers include the contractual obligations incurred by plaintiff herein with regard to minimum quantity of purchase and computation of royalty fee payments?

(4) Did the purchase price plaintiff paid for the subject merchandise include the amount paid for royalty fee or was the royalty fee paid for a separate right to manufacture the Miracle Brush?

(5) Did the plaintiff's exclusive right to manufacture and sell the Miracle Brush increase the value of the components, one of which was the imported brush heads?

The merchandise covered by this action consists of cloth brush heads for Miracle Brushes and Mini Miracle Brushes which were appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, 19 U.S.C. 1401a(b), at the invoice value of 12 cents per unit, f.o.b. port, plus 6 cents per unit royalty fees, net packed. The above facts are agreed upon by the parties. In addition the parties agree the appraisement is separable. Therefore, the issues of fact which defendant contends exist, all relating to the elements of appraisement, are for the reasons which will be set forth *infra* not issues of material fact subject to trial.

The question of separable appraisements and the necessary proof in such matters have been the subject of extensive litigation. In *United States* v. *H. M. Young Associates, Inc.*, 62 CCPA 20, C.A.D. 1138, 505 F.2d 713 (1974), the court reviewed the doctrine of separability and its background making the following statements:

> As we said in *Pan American* [57 CCPA 134, C.A.D. 993, 428 F.2d 848 (1970)], the phrases "separable appraisement" and "separability rule" were succinctly explained in *United States* v. *Supreme Merchandise Co.*, 48 Cust. Ct. 714, A.R.D. 145 (1962), as follows:
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> > If ex-factory prices and other charges are separately stated on the invoices and the appraiser's finding of value is expressed in terms of the invoice unit prices, plus the questioned charges, the appraisement is deemed to be separable. *United States* v. *Dan Brechner et al.*, 38 Cust. Ct. 719, A.R.D. 71 (1957); *United States* v. *Gitkin Co.*, * * *; *Valley Knitting Co., Inc., et al.* v. *United States*, 44 Cust. Ct. 599, Reap.

Dec. 9627 (1960). Under the rule expressed in *United States* v. *Fritzsche Bros., Inc.*, 35 CCPA (customs) 60, C.A.D. 371 (1947), a party to a reappraisement proceeding may challenge one or more of the elements entering into an appraisement, while relying upon the presumption of correctness of the appraiser's return as to all other elements, whenever the challenged items do not disturb the effect of the remainder of the appraisement. Such is the case in the instance of an appraisement at ex-factory-plus-charges value, and the charges may be disputed without the necessity of proof that the ex-factory prices comply with the statutory definition of export value. *United States* v. *Dan Brechner et al., supra.*

The separability rule is a salutary one. In *United States* v. *Bud Berman Sportwear, Inc.*, 55 CCPA 28, C.A.D. 929 (1967), we described it as a "framework of convenience for the analysis of disputed appraisements." While clearly productive of procedural convenience, the rule is also rooted in fairness. In every case of disputed appraisement the importer confronts, and the government enjoys, a presumption of correctness attaching to the appraiser's valuation and all items therein. Sec. 501, Tariff Act of 1930, 28 USC 2635. When the appraisement is separable and the importer challenges less than all of its separate items, it would not only be wasteful of judicial time to require the importer to prove the correctness of presumptively correct and unchallenged items, it would be unfair and incongruous. Absent the separability rule, the courts, the government, and importers would all undergo an anomalous process in which plaintiff would undertake to prove the correctness of unchallenged actions of defendant, while defendant, presumably, would abandon the presumption of correctness and attempt to prove its own unchallenged actions incorrect. To require an importer facing a separable appraisement to "challenge all or challenge nothing" seems manifestly unfair, not only to the importer, but also to the courts and to the society, which must be taxed to pay for a portion of every litigious process in which the government participates. In this sense, the separability rule, like the doctine of collateral estoppel and other procedural rules, is grounded in public policy. Collateral estoppel reduces the number of lawsuits. Separability reduces the length and complexity of reappraisement cases.

The court further commented with respect to its decision in *Pan American, supra:*

* * * Appellant reads too much into our opinion in *Pan American.* We held in that case that an importer challenging only the addition of inland charges could rely on the presumption of correctness of the ex-factory *price* as the export value, thus recognizing the continuing viability of the separability rule. We did not hold, as argued by appellant, that the importer was required to prove "that *all* elements of export value have been met."

* * * * * * *

> Our opinion in *Pan American* must be read in the light of the fact situation there present. Plaintiff had elected to challenge the correctness of the addition of inland charges. The *bona fides* of inland charges as such depends on whether such or similar merchandise is freely sold or offered to all at ex-factory prices. Part of plaintiff's burden *on that issue*, therefore, was to prove that such or similar merchandise was freely sold or offered to all on an ex-factory basis. [Emphasis quoted.]

Additionally it is to be observed the separable charges involved are not inland charges but a royalty fee which is quite different. Where a separable appraisement exists plaintiff may rely upon the appraised unit value and contest the separable charge.

A royalty fee may or may not be part of the dutiable value. When a royalty is paid on each and every importation and is inextricably intertwined with the imported merchandise such fee is part of the dutiable value. *BBR Prestressed Tanks, Inc., Frank P. Dow Co., Inc., of L.A.* v. *United States*, 64 Cust. Ct. 787, A.R.D. 265 (1970); *Erb & Gray Scientific, Inc.* v. *United States*, 53 CCPA 46, C.A.D. 875 (1966). When the fee is not inextricably intertwined with the production of the imported merchandise or is optional or is paid for the exclusive right to manufacture and sell in a designated area it is not dutiable. *United States* v. *Rohner Gehrig & Co., Inc.*, 9 Cust. Ct. 591, R.D. 5724 (1942).

In the instant case attached to the motion for summary judgment are the original contract and its subsequent modification. So far as is pertinent the contract provided for the purchase of all brush heads for use in the manufacture of the Miracle Brush from Nippon Seal Co., Ltd. The purchaser paid 11 cents per unit to Takashimaya Co., Ltd., the export agent of Nippon. Plaintiff was obligated to purchase a minimum of 2,200,000 brush heads per year and a maximum of up to 3,000,000. A royalty of 7 cents for one-third of the total brush heads purchased was to be paid to Nippon within 60 days after date of the bill of lading. It also appears the same brush head used in manufacturing the Miracle Brush which utilized a patented handle was used in the manufacture of the Mini Miracle Brush using a non-patented handle.

It is urged the royalty fee was for the exclusive right to manufacture and sell in the United States the brush with the patented handle. The one-third basis of the fee was arrived at by virtue of the fact that one-third of the heads were manufactured with the patented handle.

The parties are in agreement that no royalty was paid on the instant importation. However since the evidence establishes the payment of royalties on approximately one-third of the brush heads imported, it is incumbent on the court to determine whether or not such a fee is dutiable.

As indicated, *supra*, the imported brush heads manufactured by Nippon Seal Co., Ltd. were purchased by plaintiff for manufacture of two types of brushes. One brush utilizes a patented rotating handle known as the Miracle Brush. The patent is owned by Nippon Seal Co., Ltd. The other brush utilizes a fixed handle which is not patented and is known as the Mini Miracle Brush. The license and right to manufacture and sell the Miracle Brush on an exclusive basis is set forth in the contract between the parties and its modification.

Defendant relies upon *BBR Prestressed Tanks, Inc., supra*, and *Erb & Gray* cited therein. In *BBR* an importer of machinery was compelled to pay a royalty fee on each machine imported, the fee to benefit the manufacturer. It was contended therein that the money paid was a license fee and as such not dutiable. The court found for the defendant stating that a sum which is contractually required in which the importer has no option in connection with such an importation and which is intimately related to the use of the importation must be included in the price of merchandise under export value. The court further stated when a so-called royalty fee is paid for each machine and such compulsory payment is made to the seller and not the patent holder, the identity of the fee to the price is stronger than its relationship to the exclusive territory within which the purchaser may utilize the BBR method of constructing prestressed tanks.

BBR is distinguishable from the case at bar since the royalties are payable on only approximately one-third of the total importations. The payment of the fee to the seller and not the holder of the patent in both *BBR* and the instant case while similar is distinguishable. In this case Nippon is both the seller and the patent holder and accordingly benefits from the royalty. Therefore, the linking of the royalty is not so constituted as to be considered part of the purchase price.

In *Erb & Gray*, the court considered the importations of microscopes which were appraised at a unit value which included a "New York Office Service and Operation Fee." The Court of Customs and Patent Appeals held, based upon the substantial evidence of record, that the service fee paid by the importer on each unit was properly part of the export value. This fee was agreed upon by the importer in order to continue the operation of the New York office. The payment once agreed upon was not optional but required for each and every microscope imported and became a condition of the purchase of each instrument. The facts at bar indicative of a fee for payment of a royalty on only one-third of the heads shipped are distinguishable. Payment was not made on each and every importation as in *Erb & Gray*. In addition, as indicated, *supra*, the payment of a royalty on one-third of the amount of brush heads was based upon their use with the patented handle. The payment is not so intimately related to the importations as to be part of the dutiable value.

In *Rohner Gehrig & Co., Inc., supra*, the importer purchased an exhaust blower from a foreign manufacturer. In addition he paid a fee to the engineer for advice and a license to use the engineer's patented system in manufacturing a machine which incorporated the blower. The engineer, Dr. Buchi, was not related to the manufacturer of the blower but utilized the manufacturer's branch office as collecting agent for his fee. The importer contended the fee was optional and, therefore, not part of the export value. The Government contended the fee was not optional and this was evidenced by the fact the manufacturer of the blower collected Dr. Buchi's fee. This contention is clearly indicated in the decision as follows:

> The Government contends that the dutiable export value is the manufacturer's invoice price plus $960.00 paid to the patentee of the aforesaid system for the *right to use* the blower, or a total of $3,152.00. [Italics quoted.]

We are of opinion that this contention is based on a false premise. The fee collected by the seller for Dr. Buchi was for the right to use Dr. Buchi's system for the production of a Diesel engine in the United States and not for the right to use the blower manufactured by Brown, Boveri & Co., Ltd. The importation did not consist of a Diesel engine manufactured under the patent issued to Dr. Buchi. It consisted of only a blower which was purchased for use in the manufacture of the engine. It is merely a material or a part to be used in the construction of the engine. It is obvious that the Buchi system is not a part of the supercharging blower sold by Brown, Boveri & Co., Ltd. While the Buchi system requires a supercharging blower to be operative, the Brown-Boveri blower is not necessary to the system. Any supercharging blower would do if it produced the proper volume of air pressure.

Based upon the foregoing the court is of the opinion the royalty paid to Nippon is not dutiable. The royalty on the brush heads was a sum paid for a bona fide right obtained from the exporter which is in addition to and separate from the purchase price of the involved merchandise. This payment was for the exclusive right to manufacture and sell Miracle Brushes in the United States. It was a valuable right granted by the manufacturer to an unrelated purchaser for a fee paid in addition to the price of the brush heads.

The importation did not consist of a complete Miracle Brush manufactured under the patent but only the brush head. It is merely a part to be used in the construction of a complete brush. The patented rotating handle is not part of the brush head sold by Nippon. Indicative of the fact that the royalty is tied to the brush handle, which was the patented item, are the Letters Patent for United States Patent No. 3421171 and the opinion of patent counsel dated July 7, 1972 attached to the moving papers. While the patented handle

requires a brush head to be operative, the Nippon Seal brush head is not necessary for that purpose. Any brush head would do. Additionally, it is not disputed that the contractual arrangements were arrived at through arms length negotiations. Under these circumstances it is the opinion of the court that the royalty is not part of the dutiable value.

Accordingly, plaintiff's motion for summary judgment is granted. Judgment will be entered accordingly.

(C.D. 4673)

AMELIOTEX, INC. *v.* UNITED STATES

Elastomeric fiber—Multifilament yarn

"Sarlane," elastomeric fiber imported from Belgium, was classified as a monofilament under item 309.03 or 309.06 of the tariff schedules, depending on the denier of the fiber, and assessed with duty, respectively, at the rate of 35 or 24 percent ad valorem. Plaintiff contested the classification claiming that the imported yarn consisted of strands which are not monofilaments, as classified by the customs officials, but rather multifilaments, or grouped filaments, properly dutiable at the rate of 14.5 percent ad valorem under item 309.31. *Held:* Since plaintiff did not succeed in proving that Sarlane was a multifilament, i.e., grouped filaments, as claimed, and not a monofilament, as classified, the claim is overruled.

MONOFILAMENT

The statutory definition of "monofilaments" is not limited to single filaments, but also includes single filaments "produced from two or more filaments fused or bonded together."

The exhibits and expert testimony indicate that the filaments of Sarlane have been fused or bonded together during the production process so as to constitute a monofilament, as classified.

EXPERT TESTIMONY

In cases depending upon technical factual data, in large measure, the court's finding is based upon its evaluation of the expert testimony.

Although the expert witnesses agreed on the nature of the manufacturing process, they differed on the effect of that process upon the filaments and whether it caused a "fusing" or "bonding." On this phase of the case, the court accepted the testimony of defendant's expert that the filaments of Sarlane have been fused or bonded during the production process so as to constitute a monofilament.

PRESUMPTION OF CORRECTNESS—BURDEN OF PROOF

In order to overcome the presumption of correctness attaching to the classification of the customs officials, plaintiff must prove that the classification is erroneous, and that the claimed classifica-

tion is correct. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *Technical Tape Corp.* v. *United States*, 55 CCPA 38, C.A.D. 931 (1968).

In the case at bar, plaintiff has not borne its dual burden in proving that Sarlane consists of "multifilaments" or "grouped filaments" and not "monofilaments," Specifically, plaintiff has not proved that the Sarlane filaments have not been fused or bonded together during the production process.

Court No. 71-10-01429

Port of New York

[Judgment for defendant.]

(Decided November 19, 1976)

Rode & Qualey (*John S. Rode* and *Michael S. O'Rourke* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John A. Gussow*, trial attorney), for the defendant.

RE, Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain Sarlane elastomeric fiber, invoiced as "Spandex Elastomeric Multi-Filament Yarns."

The merchandise, imported from Belgium in 1970, was classified as a monofilament under item 309.03 or 309.06 of the Tariff Schedules of the United States [TSUS], as modified by T.D. 68-9, depending on the denier of the fiber (not presently at issue), and assessed with duty, respectively, at the rate of 35 or 24 percent ad valorem.

It is plaintiff's contention that the imported yarn consists of strands which are not monofilaments, as classified by the customs officials, but rather multifilaments, or grouped filaments, which have not been subjected to such processes as twisting and untwisting, false twisting, crimping, and curling. Hence, plaintiff protests the classification, and claims that the merchandise is properly dutiable at the rate of 14.5 percent ad valorem under item 309.31, as modified by T.D. 68-9.

The tariff schedules in schedule 3, part 1, subpart E, headnote 3 contain the following pertinent definitions:

> "(b) the term 'monofilaments' embraces single filaments (including single filaments of laminated construction or produced from two or more filaments fused or bonded together), whether solid or hollow, whether flat, oval, round, or of any other cross-sectional configuration, which are not over 0.06 inch in maximum cross-sectional dimension;
>
> * * * * * * *

(e) the term 'grouped filaments . . .' embraces two or more filaments . . . grouped together with the filaments . . . substantially parallel and not twisted, but the term does not include grouped filaments which have been subjected to processes such as twisting and untwisting, false twisting, crimping, and curling, and which are useable as yarns;"

Items 309.03 and 309.06 of the tariff schedules, pursuant to which the merchandise was classified, provide as follows:

	"Monofilaments (in continuous form), with or without twist, whether known as monofils, artificial horsehair, artificial straw, yarns, or by any other name:	
	Not over 150 denier:	
	* * * * * * *	
309.03	Valued over 80 cents per pound	35% ad val.
	Over 150 denier:	
	* * * * * * *	
309.06	Valued over 85 cents per pound	24% ad val."

Plaintiff claims that the merchandise is dutiable pursuant to item 309.31 which provides:

	"Grouped filaments . . . (in continuous form), whether known as tow, yarns, or by any other name:	
	Wholly of grouped filaments (except laminated filaments and plexiform filaments):	
	* * * * * * *	
	Other:	
	* * * * * * *	
309.31	Valued over 80 cents per pound	14.5% ad val."

"Sarlane," the trade name of plaintiff's product, is a "spandex" fiber noted for its elastomeric properties, i.e., the ability to stretch and recoil with a high and rapid recovery. It is used particularly in foundation garments, waistbands, sportswear, and sport hosiery.

Whether Sarlane yarn consists of "monofilaments," as classified by the customs officials, or "multifilaments" or "grouped filaments," as claimed by plaintiff, is a question of first impression before this court. In the last analysis, its determination depends upon the technical factual data presented. In large measure, the court's finding is based upon its evaluation of the expert testimony of the witnesses. More specifically, the decision must be grounded upon what occurred during the production or manufacture of Sarlane, and particularly in the drying process. In view of the importance of the expert testi-

mony, and the technical aspects of the production of Sarlane, it will be necessary to summarize the evidence in some detail.

The record consists of the testimony of five witnesses, three called by the plaintiff, and two by the defendant. Of the seventeen exhibits in evidence, eight were introduced by plaintiff, and nine by defendant.

It must be noted, at the outset, that the statutory definition of "monofilaments" set forth in headnote 3(b) is not limited to single filaments, but also includes single filaments "produced from two or more filaments fused or bonded together." It is, therefore, inconclusive to assert that Sarlane consists of individual filaments. The important question is whether the filaments have been "fused" or "bonded." Apart from the definitions submitted by the expert witnesses who testified in this case, reference has been made to the various technical dictionaries that define these words. *Bonding* is described as a method of pressing fibers into thin sheets or webs that are held together by adhesive chemicals. See *Fairchild's Dictionary of Textiles* 71 (1967); *Encyclopedia of Textiles* 501 (1969). *Fused* is defined by *Webster's Third New International Dictionary* 925 (1961) as "melted together: united by heating . . . reduced to liquid by heat; MOLTEN." The *Encyclopedia of Textiles* 508 (1969) also defines "fuse" as "[t]o melt with the application of heat."

By their pleadings, the parties have narrowed the issue presented, and have agreed that Sarlane is neither of laminated construction, nor plexiform filaments, nor strips over 0.06 inch, but less than one inch in width, and not over 0.01 inch in thickness. The parties have also agreed that the merchandise is valued at over 80 cents per pound.

The question presented, therefore, is whether plaintiff has borne its burden of proof that Sarlane should have been classified as a multifilament or grouped filament, rather than a monofilament as found by the customs officials. Under the pertinent tariff provisions, it is clear that plaintiff cannot succeed unless it can prove that the filaments in the Sarlane fiber have not been fused or bonded together so as to constitute a monofilament. If a fusing or bonding has occurred, the imported merchandise has been correctly classified and the protest must be denied.

Dr. Timothy V. Peters, founder and president of plaintiff corporation, holds a doctorate from Rutgers University for majors in physical and analytical chemistry, and has nearly nineteen years experience in research, development, and production of spandex fibers. He holds U.S. patent No. 3,699,205, and the Belgian and Japanese equivalents which cover the process he invented for the manufacture of Sarlane fiber. A Belgian company, Fabelta, Division of U.C.B., and a Japanese company, Fuji Spinning Company, Ltd., have been licensed to produce Sarlane under Dr. Peter's patents. The merchandise at bar is representative of the Sarlane produced in Belgium.

Plaintiff introduced into evidence a schematic process flow chart to describe the patented method of production of Sarlane in Belgium. It was used by Dr. Peters to describe the process from its basic raw materials, through a reaction producing polyurethane in solution, to extrusion of the fully reacted product through a spinnerette whereby ten groups of filaments, eighteen filaments to a group, are produced. He explained how the individual filaments are lead through extraction baths to extract the solvent, gathered into groups of eighteen, dried to remove any individual water, lubricated as a group to prevent sticking together, wound onto packages, inspected and shipped to customers. Dr. Peters also contrasted this wet spinning process, by which Sarlane is produced, with three other manufacturing processes for the production of spandex fibers.

The testimony reveals that the melting point of Sarlane is between 240 and 245 degrees centigrade, and that during its production process, Sarlane is not exposed to temperatures greater than 190 to 195 degrees centigrade. Dr. Peters testified that at 195 degrees centigrade, reached during the drying process, Sarlane filaments are capable of "flow and creep." Predicated upon this testimony, the defendant, in its post-trial brief, submits that this phenomenon indicates that the filaments have been fused. Plaintiff explains that the terms "flow" and "creep," as used by Dr. Peters, only indicate the potential of the Sarlane molecules to flow by one another "inside the individual filament itself," in a time-dependent process to relieve internal stress. Dr. Peters testified that Sarlane "does not melt at all in the process of manufacture" permitting each individual filament to maintain the "same outward appearance" during this phenomenon. He added that elastomeric products such as Sarlane do have, however, a "natural tack" which causes the eighteen individual filaments to remain in a group rather than coalesce. He attributed this to the low modulus of the filaments which permits a maximum area of surface contact.

Dr. Peters asserted that the eighteen filaments in a strand of Sarlane could be separated by hand manipulation. Having testified that "two or three separate filaments" had been separated from the strand, he stated that with time he could separate all eighteen. He explained the fact that the separate filaments could not be put together after being pulled apart by the inability to achieve "the same degree of surface contact or of surface congruency that existed before I broke them [the filaments] apart."

Defendant, in its brief, contends that this "breaking experiment" proves the defendant's position, i.e., that Dr. Peters "could only break . . . [the strand] into three coalesced bundles . . . . Rather than separating the spandex fiber at issue . . . Dr. Peters . . . caused the fiber to *rupture*, precluding any concept of mere separation of separate fibers."

Dr. Samuel J. Golub, an expert witness called by plaintiff, specializes in fiber analysis, research in fabric defects, and related textile studies. He holds bachelor's and master's degrees in biology from the University of Massachusetts, and a doctorate from Harvard. He is presently the assistant director of Fabric Research Laboratories, Dedham, Massachusetts, the largest independent textile research laboratory in the United States.

From his examination of the Sarlane elastomeric fiber with both "light" and scanning electron microscopes to determine its morphology, Dr. Golub testified that the structure of Sarlane fiber is innately multifilament, and that there is no merging or mixing of material from one filament to another. He, therefore, concluded that there is no fusion between filaments. Nonetheless, Dr. Golub admitted that Sarlane filaments are lightly cohered at points along the length of the individual filaments. Although he stated that the points of coherence constitute only a very small percentage of the surface area, it is significant to note that he also stated that at these points there is true coherence. Dr. Golub added that he found no foreign material or different molecular material between filaments as there is in bonding.

A photomicrograph of the broken end of one strand of Sarlane yarn, which had been immersed in liquid nitrogen and broken, revealed to Dr. Golub that the individual filaments "act independently because . . . they break at different levels." Another photomicrograph of a direct end view of a strand was partially out of focus. This apparently was due to the higher level of breakage of some filaments as compared to others of the same strand. Dr. Golub was convinced, therefore, that the filaments are cohered only very slightly.

To explain the concept of "coherence" or cohesion, Dr. Golub described two very finely polished plates of steel known in the metallurgical trade as Johanson blocks. Since cohesion is the attraction of molecular forces of the same kind of molecules, the molecular attraction between the two smooth surface areas of the steel plates must be very strong. In fact, Dr. Golub explained, "if you put them together you can't pull them apart. You have to slide them apart." He concluded that the same attraction accounts for the tendency of Sarlane filaments to remain in one group which, admittedly, is a desirable characteristic in multifilament yarns. Dr. Golub posited that due to the low modulus and softness of Sarlane, molecular attraction exists across the flattened interfaces of the individual filaments, and gives true coherence. He admitted, however, that one hundred percent coherence between filaments would result in a monofilament.

Dr. Golub testified that the points of coherence comprise only one percent of the surface area of a fiber, and that these points were very far apart permitting the material in between to extend a great deal. Therefore, if one wishes to bend the Sarlane strand, "there is ample

distance for stretch and curvature without involving other filaments." Permitting a short section of Sarlane a few inches long to hang over his finger, Dr. Golub noted the good draping quality, stating that this is peculiar to a multifilament fiber rather than a monofilament. He explained that in the multifil "the only element which is being stretched really is the single fiber at the very outside of the curvature, with the radius of curvature different from that on the inside, and the individual filaments have room to move and adjust. That is the reason a multifil bends down so easily." He added that a monofilament spandex, such as Vyrene, is stiff due to its monofil character, and does not exhibit the draping quality characteristic of Sarlane.

Dr. Monroe Couper, called as an expert witness on behalf of defendant, received the degrees of bachelor of science and chemistry, master of science, and doctorate degree at the University of Virginia where his doctoral thesis related to organic chemical structure and reaction mechanisms. At present senior research chemist in textiles at the du Pont Company, Dr. Couper has been in the field of polyurethane and spandex fiber structure, preparation, and processing for over fifteen years. At a time when Dr. Peters was also employed by the du Pont Company, Dr. Couper served as supervisor in the field of spandex polymer research.

While agreeing with Dr. Golub that "not a high percentage of the circumference" of the filaments is stuck together, Dr. Couper disagreed that the points of contact are "cohered." Rather, he testified that the filaments at these points are "coalesced, which is to become unitary. . . . [T]he matter flows from one [filament] to the other. . . . That is coalescence. And bonding, very clearly, is used in this sense and fusion is used loosely in this sense."

Dr. Couper testified that the chemical composition common to all spandex fibers is polyurethane, and that the structure of the molecule consists of alternating hard and soft segments along the same polymeric chain. "The consequences are that you have, in the soft material, what could be thought of as springs and you have, in the hard material, where it has come together into clumps, the equivalent of knots or fastening points among these strings or springs. As a result of this, when you pull on the structure, you have a high degree of stretch and, when you let go, the springs recoil and you have a high and rapid recovery. This is the essential element of spandex structure which accounts for its properties."

Dr. Couper commented upon Dr. Peters' discussion of "natural tack," and pointed out that the "tackiness" of Sarlane spandex is particularly evident during the heated drying process. Dr. Couper stated that the "molecules have, at the end or edge of the fiber, an unsatisfied bond or unsatisfied forces . . . [s]o there is a concentration of unsatisfied or high force at the surface of most polymers and of

this one [Sarlane] in particular because high bonding forces have been built into the hard segments."

Dr. Couper maintained that during the drying process of Sarlane, "virtually all of the requirements for what I would call autohesion are met in this oven." "Autohesion," he continued, "is the flowing together of like materials when they are brought in contact." The requirements for *autohesion* are:

(1) the presence of strong bonds at the surface of the molecule;
(2) mobility in the molecules so that these surfaces can move about a little bit and, if they begin to touch at some place, then the bondable sites can migrate a little bit and find each other;
(3) a clean surface.

Dr. Couper concluded that "[v]irtually all of the requirements are factors favoring autohesion which are all present," and the "result would be that the surfaces would affix themselves to one another so thoroughly that they would be essentially unitary, unified. The matter in one [filament] would be virtually continuous into another."

Dr. Couper arrived at this conclusion following an examination of scanning electron micrographs made of Sarlane, and received in evidence as a collective exhibit. Prior to examination in the scanning electron microscope, the Sarlane yarn was, in some cases, frozen "by contact with dry ice, after which it was cut with the sharpest possible blade. . . ."

According to Dr. Couper, defendant's photomicrographs revealed "the merest traces or, in most cases, disappearance of what may have been an initial interface," between touching filaments. He testified that the filaments have become "very nearly unitary to a different degree here and there, so that we have bridges or bonded areas" between them. In his judgment, "autohesion . . . has occurred when these clean, mobile, and highly bondable surfaces have come together with enough degree of force and heat and mobility to cause an autohesion. . . . I would say this is fused."

From his examination, Dr. Couper concluded that the filaments are also self-bonded, or joined "into a unitary material of materials of two substances, by their being sufficiently pressed or moved together, and having sufficient flow that the molecules can get within the usual distance apart at the interface. . . . It is not necessary to have a foreign or third material at the interface to cause self-bonding. Sufficient heat, sufficient solvent, sufficient softness, and some pressure will be adequate."

Another set of photomicrographs of Sarlane, prepared by freezing in liquid nitrogren and breaking mechanically rather than cutting, was introduced into evidence by defendant as a second collective exhibit. Although the filaments appeared to be independent, by break-

ing at different levels, Dr. Couper pointed out that they were connected by "little bridges where there is a continuation or continuum of matter," or "points of weld which, in my judgment, are far more than cohesion. The matter is unitary. It is coalescence." See Appendix "A" to this opinion. He stressed that at the bridge or point of weld, the "skin of one [filament] has become the skin of the other." It is at these "little fused bridges that . . . we get the . . . virtual disappearance in localized places of what was originally the interface between the single filaments . . . ."

A third collective exhibit of photomicrographs of Sarlane was introduced by defendant to illustrate "what happens when you try to tear the filaments from one another." When a separate filament is peeled back from the bundle, a membrane, described by Dr. Couper as "a web in the webfoot of a duck," occurs, and the common skin must be ruptured as a result. See Appendix "B" to this opinion. He commented that "these are the bridge structures which are so well coalesced or self-bonded that they are having to be ripped. . . . Grouped filaments don't have, in my experience, this firm a bonding or this flowing together of a bridge." He added: "I cannot make a single tear without finding it [the webbing phenomenon]."

To demonstrate how grouped filaments act independently, defendant introduced into evidence a card, prepared by Dr. Couper, which contained four strands of dacron zero twist thirty-four filament yarn, and one strand of Sarlane, all stretched across the card. When the card was bent, relieving tension from the taut strands, all the grouped filaments of the dacron strands visibly separated from one another. This "splaying out" effect did not take place, and was not observed in the Sarlane strand.

Dr. Couper also described a phenomenon known as "heat setting." He explained that although the true melting and decomposing point of the Sarlane polymer is 240 to 245 degrees centigrade, nevertheless, at temperatures of 190 to 195 degrees centigrade found in the dryer during Sarlane processing, a viscous flow occurs between filaments which permanently deforms them. He emphasized that the "beginning of viscous flow is the place where true coalescence, in its ultimate, takes place."

Dr. Couper testified that viscous flow, which results in a fusion or autohesion of Sarlane filaments at the points of weld, is brought about by the combined "effects of heat and slight pressure" found in the dryer during Sarlane production. "The yarn must be pulled up against gravity and must be extended a little bit so that under the slight pressures that must occur there, and at these high temperatures . . . there will be a fluid-like flow."

The testimony of Dr. Couper, that Sarlane filaments experience pressure in the dryer, is consistent with that of Dr. Peters who stated

that a "very minor amount of tension is put on the yarn" which is drawn vertically upward onto the transfer rolls in the dryer. Dr. Couper explained that "very little pressure would be needed [to fuse the filaments] at the temperatures that these filaments would reach and did reach in the dryer." It is also significant that Dr. Peters, in his discussion of "flow and creep" of the filament molecules at dryer temperatures, stated that "internal stress . . . built into the spandex . . . can be released at those temperatures."

Dr. Golub, called by plaintiff in rebuttal, was critical of the manner in which some of defendant's photographs were prepared. He testified that the skin lines of the filaments photographed by Dr. Couper were "obscured by drag of the material or melt of the material over the skin line by the knife edge" when the samples were cut with a knife. He asserted that "[y]our knife blade will melt . . . the material because of the frictional heat . . . of the edge of the blade" so that "cutting is a melting process." He also attempted to explain that the inability to perceive skin lines in such scanning electron microscope photos was due to the fact that the "scanning electron microscope only shows you the surface" of a cross-section, and that "[y]ou cannot see down through it." He stated that when he performed change of focus studies with "transmitted light," he found a "skin line at every one of those junction points [between filaments]." Although Dr. Golub attempted to show that the skin lines at the points of weld or bridges preclude fusion, he nevertheless admitted that "you cannot photograph that transmitted light through and see it clearly."

Dr. Golub disagreed with Dr. Couper that the bridges or points of weld in defendant's photomicrographs represent coalescence of any kind. He did, however, agree with Dr. Couper that "this material pulls out like chewing gum." He denied that self-bonding occurs between Sarlane filaments at the stick points, and attempted to explain the reasons for the "stick points," "bridges," "web" or "duck's web." He added that bumps or asperities on the otherwise smooth filament surfaces "come in contact, and the surfaces at that contact point flatten out and cohesion occurs, then you will have, if you move . . . the filaments apart again, this chewing gum-like stretching out."

Regardless of the reasons or explanation for the phenomena, it is clear that Dr. Golub could not deny the existence of the "stick points," "bridges," or "webs."

In addition to the expert testimony that shows "fusion," defendant stresses that "the balance of the spandex trade in the United States recognizes and indeed treats the subject class of spandex as a monofilament." In support of its position, the defendant cites the "authoritative standard text in the field of spandex fibers" by Dr. R. W. Moncrieff, entitled *Man-Made Fibres* (1970), and the definition of elastomeric monofilament of the American Society for Testing Materials.

Defendant also emphasizes that fusion, i.e., autohesion and coalescence, between filaments takes place under the favorable conditions that exist in the dryer during the production of Sarlane. These conditions, enumerated by defendant in its brief, include:

(1) the presence of strong molecular bonds;
(2) the substantial heat applied in the drying chamber;
(3) the "tackiness" of the spandex surfaces in clean state; and
(4) the slight pressure exerted upon the fiber in the production process.

Although the temperature in the dryer does not exceed 190 to 195 degrees centigrade, Dr. Couper testified that at temperatures within fifty degrees of the melting and decomposing point of the polymer, viscous flow can occur nonetheless. As previously noted, this concept known as "heat setting" is a phenomenon which makes fusion or autohesion possible below the melting and decomposing point of Sarlane.

Dr. Couper's testimony was confirmed by defendant's photomicrographs of cross sections of Sarlane yarn prepared by breaking in liquid nitrogen. These photomicrographs are free from Dr. Golub's criticism relating to distortion caused by cutting yarn samples with a knife, or in a microtome for microscopic examination. One such photomicrograph clearly reveals "little bridges or points of weld" connecting the Sarlane filaments. See Appendix "A."

It is at this bridge or point of weld that, when a filament is peeled back from the main bundle, there appears a web between filaments. See Appendix "B." As explained by Dr. Couper, "these are the bridge structures which are so well coalesced . . . that they are having to be ripped." Defendant's photomicrographs of filaments torn from one another clearly show this webbing phenomenon.

Although plaintiff believes the contrary, its own photograph, Appendix "C" to this opinion, fails to establish that fusion does not occur between Sarlane filaments. Pointing to the encircled portions of the photograph, Dr. Golub attempted to indicate a skin line between adjacent filaments. The two squares or blocks on that same photograph, however, show no discernible or visible skin lines. Notwithstanding Dr. Golub's assertion that faint lines exist, it is clear that at least at these points the filaments are not independent but are manifestly fused.

In customs classification cases, it is fundamental that plaintiff bears the dual burden of proving that the classification ascribed to the merchandise by the customs officials is wrong, and that the plaintiff's claimed classification is correct. The presumption of correctness rests on firm judicial authority. In the past it enjoyed statutory dignity only in reappraisement cases. Since 1970, it was incorporated into the Customs Courts Act of 1970 and is now expressly made applicable "[i]n any matter in the Customs Court."

In *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970), the Court of Customs and Patent Appeals reaffirmed and emphasized the importance of the presumption of correctness, and the dual burden that must be borne by the plaintiff. By a preponderance of the evidence, it is the plaintiff who must persuade the court that the Customs classification is wrong and that the claimed classification is correct. *United States* v. *New York Merchandise Co., Inc., supra; Technical Tape Corp.* v. *United States*, 55 CCPA 38, C.A.D. 931 (1968). In the language of the *New York Merchandise* case, it is plaintiff who must bear "the ultimate burden of persuasion." 58 CCPA at 58.

What is obvious, that customs classification cases are seldom free from all doubt, has on occasion been specifically articulated. *Vilem B. Haan et al.* v. *United States*, 67 Cust. Ct. 104, C.D. 4260, 332 F. Supp. 182 (1971). From an evidentiary standpoint, whether plaintiff in a particular case has borne the dual burden of proof is often a difficult and close question. *Automotive Tire Service, Inc.* v. *United States*, 66 Cust. Ct. 305, C.D. 4208 (1971). In the case at bar, the specific question presented is whether plaintiff has established or persuaded the court, that the "Sarlane" spandex fiber has been erroneously classified under the tariff provision for "monofilaments," and that it should have been properly classified under the provision for "multifilaments," or "grouped filaments." Notwithstanding the competent and thorough presentation, the plaintiff has not succeeded in meeting its dual burden. It is, therefore, the determination of this court that its claim must fail.

In order to prevail, it was incumbent upon plaintiff to establish that "Sarlane" consisted of "multifilaments" or "grouped filaments," and not "monofilaments" within the meaning of the Tariff Schedules of the United States. As was indicated previously, the statutory definition of "monofilaments" is not limited to single filaments, but "embraces," i.e., includes single filaments "produced from two or more filaments fused or bonded together." The crucial question, therefore, is not whether "Sarlane" is a single filament, i.e., "a monofilament," but rather, whether it is "produced from two or more filaments fused or bonded together."

After a careful study of the exhibits and the expert testimony, the court has concluded that the individual filaments in "Sarlane" have been fused or bonded together in the process of its production.

The expert testimony described the manufacture or production of Sarlane. It cannot be doubted that the drying process is of special importance. Although the witnesses agreed upon the nature of the process and the filaments, they differed on the precise effect of the process upon the filaments, and whether it caused or constituted a "fusing" or "bonding."

Some of the testimony left the impression that the words "fused" or "fusion" were studiously avoided. From some of the testimony of plaintiff's witnesses, the fusion of the filaments in the production of Sarlane was not enough because it occurred at only a small percentage of the surface area. On this crucial phase of the case the court accepts the testimony and conclusion of Dr. Couper that the filaments have been fused.

Much of the testimony that deals with "viscous flow," "flow and creep," "tackiness," "webbing," "breaking," "fastening points" and the like is best explained by Dr. Couper. The court finds his testimony plausible and credible, and fully supported by the exhibits.

The president of plaintiff corporation, Dr. Peters, and Dr. Golub, who supported his testimony, were vigorous in their view that the filaments were neither fused nor bonded. They were unable, however, to deny those factors or phenomena that caused Dr. Couper, defendant's expert, to testify that the filaments were "coalesced," "unitary," "unified" or "fused." Notwithstanding the various labels designed to describe what occurred to the filaments in the drying process of the production of Sarlane, such as "natural tack," "points of weld," "fastening points," "stick points" or "web," it would seem clear that the filaments were thereafter no longer independent filaments.

It may be well to add that plaintiff's reliance upon the example of the Johanson blocks is misplaced, since it does not answer the question whether Sarlane filaments were fused or bonded together during production. In the drying process of Sarlane, the filaments are subjected to temperatures which cause a "flow and creep" or "viscous flow." As a consequence, one filament cannot be removed or separated from another without causing a "webbing" or "tearing." On the other hand, the Johanson blocks upon separation remain intact and fully independent.

The defendant did not merely rely upon the presumption of correctness that attaches to the classification of the customs officials. It came forward with credible and reliable evidence in support of the classification of the merchandise. Since the court is in agreement with the factual conclusions submitted by the defendant's expert, it is clear that plaintiff has not borne its burden of proof.

On the record before the court, after a careful study of the testimony of the witnesses and the exhibits, it is the determination of the court that plaintiff has not succeeded in proving that Sarlane was a multifilament, i.e., grouped filaments, as claimed, and not a monofilament, as classified.

In view of the foregoing, the protest is overruled and the classification is sustained.

Judgment will issue accordingly.

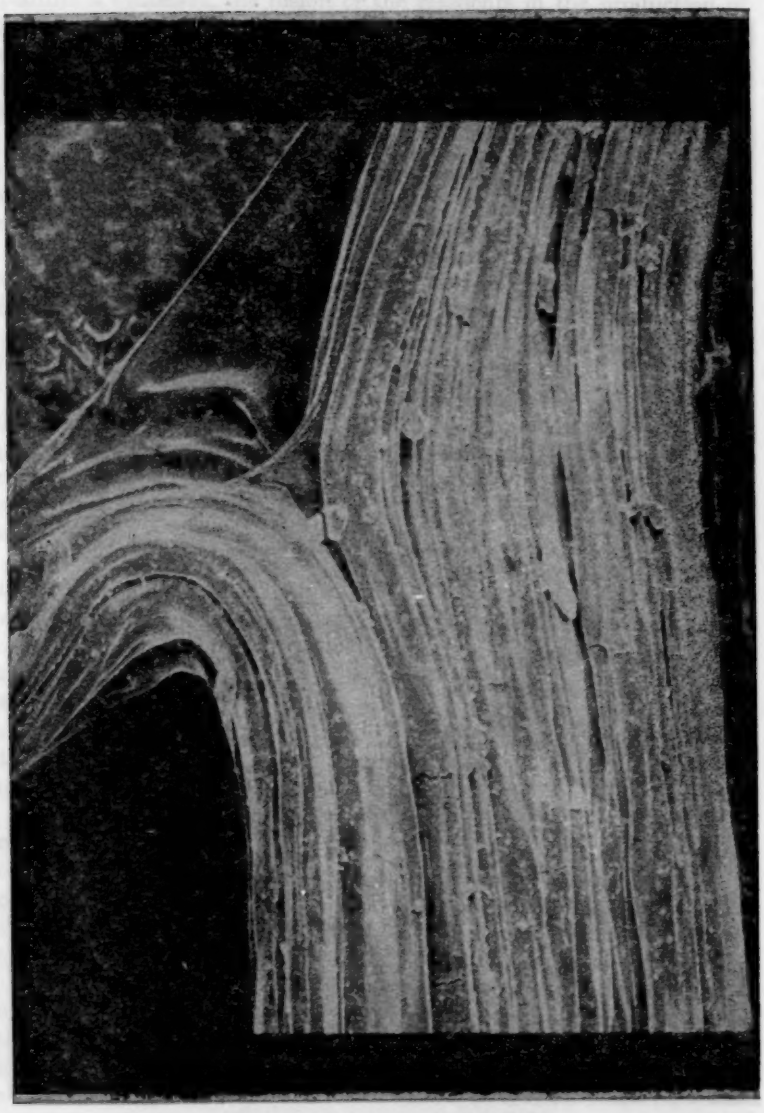
APPENDIX A

Defendant's Exhibit E,
Photomicrograph #4.

"SARLANE" 280 DENIER
SEM – BUNDLE BROKEN IN LIQUID N_2 4000X

APPENDIX B

Defendant's Exhibit F,
Photomicrograph #4.



"SARLANE" 280 DENIER
SEM – BUNDLE SEPARATED BY PULLING APART BY HAND – 400X

APPENDIX C

Plaintiff's Exhibit 7,
Photomicrograph D.

Sarlane, 70 denier
SEM – 1530X

(C.D. 4674)

DAVID KOMISAR & SON, INC.
DAIDO CORP.
KARL SCHROFF & ASSOCIATES, INC. } *v.* UNITED STATES

Screws

Screws fully threaded composed of unhardened steel, classified as screws, other, under item 646.60 and 646.63 TSUS *held* to be wood screws under item 646.49 TSUS.

The imported screws are made in the form of machine screws ordinarily used in metal but are made of unhardened metal and therefore incapable of use in metal. The screws are used in thin plywood or hollow core doors.

While the screws may be hardened after importation and as such usable in metal, they do not constitute "unfinished" under General Interpretative Rule 10(h) since they are complete and usable in wood as intended in their condition as imported.

Court Nos. 66/25014, etc.
Court Nos. 66/59707, etc.
Court No. 67/50316

Port of New York

[Judgment for plaintiff.]

(Decided November 26, 1976)

Allerton deC. Tompkins for the plaintiffs.
Rex E. Lee, Assistant Attorney General (*David R. Ostheimer*, trial attorney), for the defendant.

FORD, Judge: This matter is in effect a retrial of *Trans-Atlantic Company* v. *United States*, 68 Cust. Ct. 105, C.D. 4344 (1972), the record of which was incorporated. The actual importer or ultimate consignee is David Komisar & Son, Inc. notwithstanding the fact that entries were made in the name of Daido Corp., Karl Schroff & Associates, Inc. or David Komisar & Son, Inc.

Two factors distinguish the present cases and *Trans-Atlantic*. In the decided case the merchandise was invoiced as "Flat Head Fully Thread Slotted Wood Screws" while the invoices in the cases at bar describe the merchandise as sheet metal screws with or without further terms of description. Additionally, the Customs Laboratory made an analysis of the metal in the decided case and found a carbon content of 0.08 percent which was admittedly low carbon whereas in the cases at bar no finding of carbon content had been made by either party.

The merchandise imported was classified under items 646.60 and 646.63, Tariff Schedules of the United States, or as modified by T.D. 68–9, depending upon the diameter of the shanks of the screws. Duty was assessed at various rates under each provision depending upon the dates of entry.

Plaintiffs contend the proper classification is item 646.49 TSUS as wood screws and as such subject to duty at 12.5 per centum ad valorem.

The pertinent provisions involved herein provide as follows:

	Bolts, nuts, studs and studding, screws, and washers (including bolts and their nuts imported in the same shipment, and assembled bolts or screws and washers, with or without nuts); screw eyes, screw hooks and screw rings; turnbuckles; all the foregoing not described in the foregoing provisions of this subpart, of base metal:	
	Of iron or steel:	
	* * * * * * *	
	Screws:	
	* * * * * * *	
	Other:	
646.60	Having shanks or threads not over 0.24 inch in diameter	22.5% [1963–67], 20% [1968], 18% [1969], 15.5% ad val. [1970]
646.63	Having shanks or threads over 0.24 inch in diameter	19% [1963–67], 17% [1968], 15% [1969], 13% ad val. [1970]
	Wood screws (including lag screws or bolts) of base metal:	
646.49	Of iron or steel	12.5% ad val.

The record in the incorporated case and the case at bar establishes that wood screws are ordinarily threaded for two-thirds of the shank whereas metal screws, machine screws, or tapping screws, the terms being synonymous, are fully threaded. A machine screw will make its own threads in metal and a wood screw will do the same in wood. All witnesses agree the unhardened screws involved cannot be used in

metal because they are too soft since they are of low carbon content and are unhardened. The involved screws are used in hollow doors and thin plywood for which they are particularly satisfactory since the threads extend to the head. The use of the ordinary wood screw on such material would prove unsatisfactory.

In *Trans-Atlantic* the court concluded as follows:

> As there is no dispute between the parties that the imported articles are screws and that commercial designation is not involved, the issue therefore revolves about the extent of the common meaning, i.e., does it refer to a physically distinct type of screw, having only two-thirds of its shank threaded or does it embrace any kind of screw which is primarily used in wood?
>
> We are of the opinion that the latter controls notwithstanding the fact that the statute provides *eo nomine* for wood screws. The use of an article provided for *eo nomine* has ofttimes been considered an important factor in determining the proper tariff classification. *United States* v. *Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959). The intent of Congress in enacting the language "Screws, commonly called wood screws" from the Tariff Act of 1897 to the Tariff Act of 1930 clearly indicates the term to mean screws intended for use in wood. *The Summaries of Tariff Information*, 1920, 1921, 1929; *Dictionary of Tariff Information*, 1924. The dictionary definitions set forth in the case of *United States* v. *Astra Bentwood Furniture Co.*, 25 CCPA 340, T.D. 49434 (1938), and the present day dictionaries such as *Funk and Wagnalls Standard Dictionary*, international edition (1963), p. 1449, and *Webster's Third New International Dictionary*, unabridged (1961), p. 2631, confirm the fact that wood screws are intended for use in wood.
>
> On the other hand, the "*American Standard*" published by the American Society of Mechanical Engineers, defendant's exhibit A, and *The New American Machinists Handbook* (1955), indicate a thread length of approximately two-thirds of the screw length.
>
> An examination of the record and plaintiff's collective exhibit 1, the imported screws, indicates to us that the imported article appears to be a hybrid developed for use in hollow doors, plywood, etc., wherein the thread to the head functions better than one partially threaded, yet is made of unhardened metal. Thus it is in the form of a screw ordinarily used in metal but is composed of unhardened metal and consequently unusable, as all witnesses agree, for that purpose. The imported screws appear to be primarily used in wood although admittedly they can be used in other soft material such as linoleum, asbestos and soft plastic.
>
> Since our conclusion is that the imported screws are wood screws, classification under item 646.60, *supra*, must fall as the provision for wood screws under item 646.49, *supra*, is more specific. In addition, the language of the superior heading to item 646.60, *supra*, limits the screws provided therefor to such screws as are not described in the foregoing provisions of the subpart involved.

Defendant called Mr. L. J. Lovisek, an engineer with Industrial Fasteners Corp. with approximately 45 years experience in the field of screws and other fasteners. In effect the witness agreed the imported screws are too soft for use in metal and would serve the function for use in wood. This, however, in his opinion, does not make such screws wood screws. They would be unhardened machine screws. He further testified there are two methods of hardening screws, cyanide and gas carburizing, which he described as follows:

> Q. Could you explain to the Court the two different types of hardening processes that you just mentioned?
>
> A. Cyanide process is involved with two different ways of heat treating. In one, sodium cyanide is heated until it is melted. The parts are put into it until they get up to heat and then the parts are taken out and quenched in water. Now, that heating process causes some of the carbon from the cyanide to go into the steel and puts what we call a casing on the product. That also can be done with cyanide dust. Same process. Another process is the gas carburizing in which you take propane and break it down into elements and that atmosphere is fed into a furnace, the parts are put through the furnace and it picks up the carbon from the atmosphere and it deposits it into the steel. Again, causing a case to form. You quench after each one of these operations.

This process would harden the screws and make them suitable for use in metal notwithstanding the low carbon content. The witness in fact did harden a few of the samples which were received as defendant's exhibit D.

There is nothing in the record to indicate the screws were hardened after importation or that they were sold in any condition other than as imported. Based upon the fact that the screws may be hardened after importation, defendant contends the imported merchandise is unfinished screws by virtue of General Interpretative Rule 10(h).

Such a position is totally unrealistic. The merchandise in its condition as imported constitutes a finished screw intended for use in wood and is so used.

The reasoning for General Interpretative Rule 10(h) and the prior judicial decisions to include finished or unfinished articles was solely for the purpose to encompass such merchandise as has been advanced to a point where its use as the article provided for is clear or its utility for any other use is destroyed. *Waltham Watch Co.* v. *United States*, 25 CCPA 330, T.D. 49425 (1938); *Oxford University Press, New York, Inc.* v. *United States*, 20 Cust. Ct. 78, C.D. 1088 (1948); *Norge Division, Borg-Warner Corp.* v. *United States*, 44 Cust. Ct. 121, C.D. 2164 (1960); *F. W. Myers & Co., Inc.* v. *United States*, 57 CCPA 87, C.A.D. 982, 425 F.2d 781 (1970). The merchandise at bar while in the form of a machine screw has its utility for use in metal destroyed due to a lack of hardness. It is therefore no longer a machine screw for tariff purposes.

The record does not substantiate the fact that the imported screws were hardened after importation and sold as machine screws. Moreover, an importer has the right to fashion his merchandise to permit it to be assessed with duty at the lowest rate, provided the merchandise is in fact the article described as dutiable at that rate. *United States* v. *Citroen*, 223 U.S. 407 (1912).

It is well settled that, in the absence of deception, disguise, or artifice exerted to for the purpose of perpetuating a fraud upon the revenue of the United States, imported merchandise must be classified in its condition as imported. *United States* v. *Citroen, supra; United States* v. *Baker Perkins, Inc., et al.*, 46 CCPA 128, C.A.D. 714 (1959). In addition it is the condition of the merchandise as imported which controls the classification, not what it is made into after importation, except when classification is dependent upon use. *Leonard Levin Co.* v. *United States*, 27 CCPA 101, C.A.D. 69 (1939). The claimed classification herein is an *eo nomine* provision, and the imported screws fall within such provision notwithstanding the fact that they are hybrid in form.

Judgment will be entered accordingly.

(C.D. 4675)

LANSING COMPANY, INC. *v.* UNITED STATES

Invisible zippers—Drawback

Imported invisible zippers in which the coils do not interlock uniformly, and which have sliders that are too taut and tight are inherently defective. When purchasing merchandise, there is no stronger specification, be it written or unwritten, than that which says that the delivered merchandise will function for the purpose it is designed and intended. Inherently defective invisible zippers do not conform to that specification.

Upon exportation of inherently defective invisible zippers, the importer is entitled to a refund of the duties paid upon such invisible zippers as drawback under section 313(c) of the Tariff Act of 1930, as amended. Cases cited and discussed.

Court No. 75-4-00876

Port of Chicago

[Judgment for plaintiff.]

(Decided November 30, 1976)

Weinstein, Myer, New & Berlin (*Arthur E. Bertin* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

LANDIS, Judge: In this civil action brought to recover drawback of duties, plaintiff complains that at all the customs administrative

levels [1] pursued it has been denied a refund of such duties under section 313(c) of the Tariff Act of 1930, as amended. The drawback involved 90 cartons of so-called "invisible or concealed zippers" exported from the United States and returned to the manufacturer in West Germany.

Section 313 of the Tariff Act of 1930, as amended (19 U.S.C. § 1313), provides in pertinent part as follows:

> (c) Upon the exportation of merchandise not conforming to sample or specifications or shipped without the consent of the consignee upon which that duties have been paid and which have been entered or withdrawn for consumption and, within ninety days after release from customs custody, unless the Secretary authorizes in writing a longer time, returned to customs custody for exportation, the full amount of the duties paid upon such merchandise shall be refunded as drawback, less 1 per centum of such duties.
>
> * * * * * * *
>
> (j) Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe, which may include, but need not be limited to, the fixing of a time limit within which drawback entries or entries for refund under any of the provisions of this section or section 1309(b) of this title shall be filed and completed, and the designation of the person to whom any refund or payment of drawback shall be made.

The customs regulations of Treasury (19 C.F.R.) administering the statute provide, in pertinent part, as follows:

> [Section] *22.32 Drawback entry.*—* * *.
>
> (b) Each drawback entry covering merchandise not conforming to sample or specifications or shipped without the consent of the consignee shall be executed in the name of the importer of record, unless another person has been named in the import entry as the actual owner and the declaration of such owner has been timely filed, in which case the drawback entry may be filed in the name of either such owner or the importer of record. If the goods are claimed to be not in accordance with sample or specifications, the drawback entry shall be accompanied by a copy of the order for the merchandise, copies of any preliminary correspondence, and the samples or specifications on which the merchandise was ordered, together with a certificate of the actual owner that the sample or specifications submitted are those on which the merchandise was ordered, showing in detail in what manner the merchandise does not conform to sample or specifications. If no written order was placed and no sample or specifications are available, a certificate of the actual owner setting forth the specifications of his order and the method by which they were communicated to the seller may be accepted. If the merchandise was shipped to the importer without his consent, a clear statement of that fact shall be submitted, together with all information

[1] Plaintiff filed a drawback entry and, when it was denied, filed a protest under section 514 of the Tariff Act of 1930, as amended (19 U.S.C. § 1514), which was also denied.

in the possession of the importer as to the reason for the shipment. In doubtful cases the collector may decline to allow the claim unless there is produced corroboration by the shipper of the specifications or circumstances, or other evidence sufficient in the opinion of the collector to establish the claim.

There is no dispute concerning the facts. The parties do, however, differ about what the real issue in this case is in terms of the facts. Plaintiff contends that the customs decision denying drawback raises only one issue, whether the exported zippers conform or do not conform to sample or specifications. According to plaintiff, the zippers did not conform to specifications and industry standards. Defendant in its answer to the complaint denies that the zippers did not conform to specifications and industry standards but argues in its brief that the question in this case is whether plaintiff complied with the customs regulations on drawback. Defendant postures that plaintiff did not comply because plaintiff has stipulated that at no time prior to the commencement of this action did plaintiff submit to the customs service "a certificate setting forth the specifications of its order for the * * * [zippers] and the method by which said specifications were communicated to the seller * * *." (Exhibit I.)

Compliance with the regulations on drawback is, as defendant points out, mandatory. *Nestle's Food Co. (Inc.)* v. *United States*, 16 Ct. Cust. Appls. 451, T.D. 43199 (1929); *GAF Corporation* v. *United States*, 72 Cust. Ct. 153, C.D. 4526 (1974). As the record in this case illustrates, however, compliance with the regulations can give rise to controversy when merchandise is purchased by written order on oral representations that "bugs" inherent in samples would be worked out prior to delivery.

On trial, plaintiff adduced the testimony of two witnesses, which is not rebutted.[2] Relevantly summarized, the testimony establishes that the imported zippers were purchased after discussions with the manufacturer in 1968. The manufacturer did show plaintiff samples of the zippers. Plaintiff was not, however, satisfied with the samples because the coils did not interlock uniformly and the slider was too taut and tight. It is plaintiff's testimony that in discussing the problems inherent in the samples, the manufacturer orally promised and represented that, if plaintiff placed an order for the zippers, the manufacturer would deliver to plaintiff zippers without the problems inherent in the samples. Following those discussions, there was an exchange of correspondence and written orders were placed with the manufacturer.[3]

[2] Defendant apparently discovered nothing that is contrary to the record. See, Customs Court Rules, Chapter 6.

[3] Exhibit 1 is representative of zippers delivered by the manufacturer, unpackaged. Exhibit 2 is representative of the zippers delivered by the manufacturer and packaged for sale by plaintiff. Exhibit 3 is an illustrative zipper marketed in the United States under the name "Unique".

On trial decision was reserved and the parties directed to brief defendant's objection to the admission of plaintiff's exhibits 4 and 5 in evidence. Exhibits 4 and 5 are letters bearing 1969 dates, written on the letter-

Defendant has taken the position that plaintiff's drawback application is flawed because plaintiff did not submit, to customs officials, the written purchase orders and preliminary correspondence alluded to in the testimony, or produce any specifications or samples upon which the zippers were ordered. I would suppose that the whole point of the customs regulations on drawback, as they bear on orders, correspondence, samples and specifications, is to give customs officials some criteria for decision as to whether the drawback merchandise conforms or does not conform to the orders, correspondence, sample or specifications. One difficulty is that the customs regulations are not that explicit.[4] It is understandable, therefore, that with its drawback entry plaintiff doubtless submitted the best probative evidence it had that the drawback zippers did not work properly. That evidence consisted of customer complaints and returns for credit, and its own district court complaint against the manufacturer, which suit was settled *inter alia* on terms according to which the manufacturer had to pay plaintiff $8,000. To my mind, when purchasing merchandise, there is no stronger specification, be it written or unwritten, than that which says that delivered merchandise will function for the purpose it is designed and intended. Defendant's answer to the complaint in this case does not purport to raise the issue of compliance with the customs regulations.[5] Argument that is not related to the issues raised by the pleadings is irrelevant. Accordingly, I am inclined to the view that customs officials were satisfied that plaintiff procedurally complied with the regulations.

On the merits, customs officials denied plaintiff's claimed drawback. *Prima facie* evidence of drawback, submitted to customs officials may or may not be sufficient evidence of the facts to support a judgment upon trial of the issue. *United States* v. *C. J. Holt & Co., Inc.*, 17 CCPA 385, T.D. 43822 (1930). Customs officials apparently took a cautious view of the documented record on drawback and, being somewhat in doubt, denied the plaintiff drawback. On trial of the drawback issue, plaintiff testimonially and corroboratively established that its bargain with the manufacturer specified that the delivered zippers would have coils that interlocked uniformly and sliders that were not taut or tight. The customer complaints, plaintiff's settlement of its district court complaint against the manufacturer (exhibits B and C

head of the manufacturer to plaintiff. Exhibit 4 is unsigned and for that reason inadmissible. Exhibit 5 expresses the manufacturer's appreciation of the problems inherent in the delivered zippers. Exhibit 5 came from plaintiff's regular kept file of correspondence with the manufacturer and is, therefore, admissible and received in evidence.

[4] The customs regulations do provide that: "If no written order was placed and no sample or specifications are available, a certificate of the actual owner setting forth the specifications of his order and the method by which they were communicated to the seller may be accepted." The tentative tone of the regulations might give one pause to believe that strong evidence that the merchandise was inherently defective would satisfy the law and regulation.

[5] The purpose of pleadings is to narrow the issue. *Berkey Technical Corp.* v. *United States*, 71 Cust. Ct. 275, C.R.D. 73-27, 380 F. Supp. 786 (1973).

introduced by defendant) and the testimony preponderantly support the fact that the drawback zippers were inherently defective because they did not meet those specifications. In substantially similar factual situations this court has sustained drawback. In *American Pistachio Corp.* v. *United States*, 23 Cust. Ct. 103, C.D. 1198 (1949), the importer, as required by the regulations, was unable to get the shipper to corroborate that the drawback merchandise did not conform to the specifications of the importer's order. Customs officials denied the importer's claim for drawback. This court (in an opinion approvingly quoting *United States* v. *Conkey & Co.*, 6 Ct. Cust. Appls. 487, T.D. 36122 (1916)) held that oral testimony of a state of facts conforming to the requirements of the statute could be made on trial, and sustained the claim for drawback. In *Weinberg et ux.* v. *United States*, 26 Cust. Ct. 336, Abstract 55136 (1951), plaintiffs, husband and wife, during a visit in Canada purchased a mink cape in a store which represented that the cape was of the best quality available both as to materials and workmanship. Subsequent inspection by a competent fur appraiser in the United States established that the cape did not meet those specifications and the cape was exported and returned to the seller. Customs officials denied the claim for drawback. This court held that plaintiffs were entitled to the relief the drawback statute was designed to offer and sustained the claim for drawback. In *Mattia Locatelli* v. *United States*, 63 Treas. Dec. 829, T.D. 46390 (1933), cheese was imported into the United States and duties paid thereon. Upon examination, after delivery from customs custody, the cheese was found to be moulded and, therefore, unsalable. It was exported and returned on an application for drawback. Customs officials denied the claim for drawback for the reason that "the merchandise in question conformed to the specifications of the buyer when it left the establishment of the foreign shipper, and damage during the voyage is not a matter of drawback under section 313." On trial a witness testified that customers refused the cheese because it was no good and made the importer take it back. The witness examined the merchandise taken back and saw that it was not of the usual quality delivered because it had a thick mould, and the usual quality was clean and had no mould on it. Another witness testified that the standard and specifications for the imported cheese was in all cases that it should conform to the requirements of the market and the standard of the market was that the cheese present an absolutely clean surface. There was similar testimony by a third witness. Based on the testimony the court sustained the claim for drawback.

For the reasons discussed and following the decisions cited, plaintiff's claim for drawback is sustained.

Judgment will so enter.

(C.D. 4676)

PASCO TERMINALS, INC. *v.* UNITED STATES

On Plaintiff's Motion for Rehearing

Court No. 74-5-01357

Dumping duties on sulphur

Ports of Philadelphia and Wilmington

[Motion denied.]

(Dated December 1, 1976)

Williams, Connolly & Califano (*J. Alan Galbraith* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

MALETZ, Judge: Plaintiff has moved for rehearing of the decision rendered by the court granting defendant's motion to dismiss this action. *Pasco Terminals, Inc.* v. *United States*, 76 Cust. Ct. 204, C.D. 4658, 416 F. Supp. 1242 (1976). As ground for the motion, plaintiff claims that the court has misapprehended the facts with respect to the commercial transactions involving the shipments of crude sulphur herein. It further claims that the court was misinformed as to the particulars of entry 003575 and that, despite information to the contrary listed by the customs broker on the consumption entry (and despite statements by plaintiff's attorney at the oral argument on defendant's motion to dismiss), the merchandise on that entry was actually exported on November 11, 1971 from Coatzacoalcos, Mexico aboard the H. H. *Jaquet*[1] voyage 153, along with the merchandise covered by entry 062A, and was "discharged" at Thompson's Point, New Jersey on or about November 16, 1971.

Various affidavits, copies of bank statements, checks, invoices and other papers are attached to plaintiff's memorandum in support of its motion for rehearing and to its reply memorandum to defendant's memorandum in opposition. The memoranda and attachments constitute an attempt by plaintiff to respond, with the aid of evidentiary materials available at all times, to statements in the court's opinion concerning the actual nature of the alleged commercial transactions upon which the four involved entries were based.

Although plaintiff's proffered papers do not set forth matters upon which the court might ordinarily exercise its discretion to grant a

[1] The ship's name is spelled *Jacquet* by plaintiff in its memorandum and reply memorandum in support of the motion for rehearing.

rehearing,[2] they were examined to ensure that the ends of justice would be served.

The court finds that, far from establishing the claimed "actual facts" as to Pasco's alleged role as importer and consignee, the supporting papers are rife with inconsistencies, raise new questions and, in general, confirm this court's previously stated conclusions.

One example (out of many) stems from an analysis of the invoicing procedures utilized by plaintiff and Azufrera. As corroboration of its claim that the merchandise on entry 003575 was shipped on the Jaquet voyage 153, plaintiff has attached to its reply memorandum on the motion for rehearing a *newly produced* set of *Azufrera* invoices to *Pasco* covering the shipments herein, one of which lists a *November 10, 1971* shipping date on Jaquet voyage 153 for the merchandise allegedly covered by entry 003575. All of these invoices, it is noted, are made out to Pasco Terminals, Inc., Tampa, Florida for shipments of sulphur to DuPont, either at Thompson's Point or Deepwater Point, New Jersey and charge $28.00 per long ton. The other pertinent data shown on these invoices are summarized as follows:

Date Shipped	Shipped Via	Description: Crude Sulphur in Bulk: Quantity in L/T	Date of Invoice	[Entry: Not Shown on Invoice]
11/10/71	H.H. Jaquet 153	6320.080	11/23/71	[003575]
11/10/71	H.H. Jaquet 153	4077.002	11/23/71	[062A]
11/30/71	H.H. Jaquet 154	2515.650	11/30/71	[004007]
11/30/71	H.H. Jaquet 154	1279.000	11/30/71	[066A]

The invoices were submitted with the following explanation by counsel for plaintiff (reply memo., p. 5, note 5):

> These invoices were not heretofore produced because it was not noticed that there was a discrepancy between them and those which the United States already had in its possession. The initial invoices (Exhibit 1 to the McCauley affidavit) were prepared on the indicated dates (November 9, December 6), prior to the entry of the Jacquet on Voyages 153 and 154 (November 16, December 9); they were used in preparing the Consumption Entry forms. It should be noted that the quantities set forth on these invoices are in rounded numbers: *e.g.*, 6400, 4000 (Voyage 153); 2500, 1324 (Voyage 154). The other invoices (Azufrera to Pasco, Exhibit A hereto; Pasco to DuPont, Defendant's Collective Exhibit I to its brief in support of its motion to dismiss) show

[2] See *W. J. Byrnes & Co., Inc., et al.* v *United States*, 68 Cust. Ct. 358, C.R.D. 72-5 (1972) for a succinct statement setting forth grounds for rehearing.

precise quantities (6320.080, 4077.002 (Voyage 153); 2515.60, 1279.000 (Voyage 154). These invoices were prepared after the Jacquet had discharged its cargo (November 16 for Voyage 153, December 9 for Voyage 154) because they clearly reflect actually delivered quantities as measured at the discharge port. A completely precise invoice could not be prepared before these discharge quantities became known. * * * [3]

The curious aspect of the foregoing is plaintiff's insistence (quoted above) that the newly produced set of Azufrera invoices "clearly reflect actually delivered quantities as measured at the discharge port" and that a "completely precise invoice could not be prepared before these discharge quantities became known." These statements cannot be reconciled with the data listed on *Pasco's* invoices to DuPont, nor do they square with two of plaintiff's newly produced invoices of *Azufrera* to Pasco.

Considering first *Pasco's* invoices to DuPont, Pasco had invoiced DuPont as follows for crude sulphur delivered either at Deepwater Point or Thompson's Point, N.J., charging *$28.50* per long ton:

Shipped Via	Quantity in L/T	Date of Invoice	[Entry: Not Shown on Invoice]
H.H. Jaquet 153	6320.080	11/10/71	[003575]
H.H. Jaquet 153	4077.002	11/10/71	[062A]
H.H. Jaquet 154	2515.650	11/30/71	[004007]
H.H. Jaquet 154	1279.000	11/30/71	[066A]

As indicated above, Pasco's invoices to DuPont for the sulphur shipments entered under entries 003575 and 062A are dated *November 10, 1971*, which is (assuming *arguendo* that plaintiff's claims as to the exportation and importation dates of the shipment on entry 003575 are correct) the *date of exportation* of the sulphur; these invoices also show the *"precise quantities"* of sulphur (identical to those listed on Azufrera's newly produced invoices) which were delivered some *six days later* to DuPont on or about November 16, 1971. Similarly, Pasco's invoices for shipments listed on entries 004007 and 066A are dated *November 30, 1971*, which is also the *date of exportation*, and again set out exact quantities of sulphur which were discharged *eight and nine days later* at Thompson's Point and Deepwater Point.

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[3] As a point of reference, the *first* set of *Azufrera* invoices was made out to Pascos [sic] Terminal, for shipments to Pascos [sic] Terminal (not DuPont), either at Deepwater Point or Thompson [sic] Point, N.J. and show a charge of *$28.50* per long ton. These invoices are summarized as follows:

Date Shipped	Shipped Via	Quantity in L/T	Date of Invoice	[Entry: Not Shown on Invoice]
11/11/71	H.H. Jaquet	6400	11/9/71	[003575]
11/11/71	H.H. Jaquet	4000	11/9/71	[062A]
11/30/71	H.H. Jaquet	2500	12/6/71	[004007]
11/30/71	H.H. Jaquet	1324	12/6/71	[066A]

It is also noted that the two newly produced *Azufrera* invoices covering entries 004007 and 066A are dated *November 30, 1971* and bill Pasco for shipments exported *that same date* and list the precise quantities of sulphur which were discharged *over a week later* at the aforementioned ports in New Jersey. Furthermore, they are dated six days earlier than the "initial" Azufrera invoices of December 6, 1971 covering the same shipment. See note 3, *supra*.[4]

In short, despite the fact, as stated by counsel for plaintiff, that "completely precise invoice[s] could not be prepared before * * * [the] discharge quantities became known" "as measured at the discharge port," Pasco's invoices to DuPont and two of plaintiff's newly produced invoices from Azufrera to Pasco do actually set forth the *completely precise discharge quantities* notwithstanding that each of such invoices was *dated at least six days before the discharge of the sulphur* was even effected.

The net effect of the foregoing (among other things) is to raise the most serious questions about the authenticity of *Pasco's* invoices to DuPont and *Azufrera's* invoices to Pasco. And this in turn casts even more doubt about the bona fides of the status of Pasco as a reseller. At the very least, it must be concluded from the hodgepodge of conflicting and irreconcilable dates, prices, invoices and statements that the plan to relieve DuPont of any liability for payment of antidumping duties was never intended to be and, in fact, never amounted to, more than a clumsily executed bookkeeping exercise.

The motion for rehearing is denied.

(C.D. 4677)

ASSOCIATED METALS & MINERALS CORP. *v.* UNITED STATES

Fluorspar

CALCIUM FLUORIDE CONTENT—CONFLICTING LABORATORY TESTS

In a dispute as to whether the calcium fluoride content of imported fluorspar was above or below 97% the evidence offered by plaintiff was more persuasive in being more definite as to the sampling method used, and in relying on the results of more than one testing method in three independent laboratories to support its claim of calcium fluoride content in excess of 97%.

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[4] It is observed, too, that the second set of Azufrera invoices list a price of $28.00 per long ton whereas the earlier ones billed Pasco at $28.50 per long ton.

Court No. 68/67256

Port of New Orleans

[Judgment for plaintiff.]

(Decided December 9, 1976)

Rode & Qualey (*Ellsworth F. Qualey* and *Peter Jay Baskin* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney), for the defendant.

WATSON, Judge: The correct classification of the shipment of fluorspar under dispute depends on whether or not it was more than 97% calcium fluoride by weight. The district director at the port of New Orleans found it to be less than 97% calcium fluoride and classified it under item 522.24 of the Tariff Schedules of the United States, dutiable at the rate of $8.40 per ton. Plaintiff contends the shipment contained more than 97% calcium fluoride and should have been classified pursuant to item 522.21 and assessed with duty at the rate of $2.10 per ton.

At the trial, both sides offered evidence based on laboratory tests of the calcium fluoride, those conducted in the customs laboratory showing less than 97%, those conducted in the laboratories used by plaintiff showing more than 97%. In weighing this evidence I found that plaintiff's proof was the more persuasive, sufficient initially to overcome the presumption of the correctness of the district director's decision and sufficient ultimately to withstand and surpass the evidence offered by defendant.

Deciding between conflicting laboratory reports obtained from the analysis of what is presumably the same substance might at first seem an impossible predicament. Nevertheless, although the scales of justice are not laboratory scales, fine and meaningful distinctions can still be made in the weighing of evidence.

In a number of respects, plaintiff's evidence impressed me as superior to that of defendant. It was notably stronger in its demonstration of the methodical care with which sample material was taken from the shipment in issue and transmitted for testing. It was impressively broad in its base, being founded on tests conducted in three independent laboratories, It was persuasive in its reliance on more than one method of testing and in the uniformity of the results. In addition, it was supported by meaningful evidence as to the existing course of business and the expectations of the parties regarding their fluorspar transactions. All this led me to find a preponderance of evidence on the plaintiff's side and a marked similarity to the circumstances

discussed by our appellate court in *Aluminum Company of America* v. *United States*, 60 CCPA 148, C.A.D. 1102, 477 F. 2d 1396 (1973).

Although defendant's proof was not without some strength, it was deficient on the subject of connection to the shipment at issue and less impressive in the scope and variety of its tests. I give less importance to what may have been the superiority of the preservation of underlying work notes by the defendant's chemists and the repetition of their tests than to the strong connection with the disputed shipment and uniformity of result of plaintiff's three independent laboratories. In this case I am weighing the conclusions reached by experts and would not resort to their working notes unless there was a dispute which only the underlying notes, rather than the results, could resolve.

For the above reasons I find the shipment at issue to have been composed of fluorspar with a calcium fluoride content over 97%.

Judgment will enter accordingly.

(C.D. 4678)

PARKSMITH CORP. ET AL. *v.* UNITED STATES

Court Nos. 71-12-01923, 73-5-01231 and 73-12-03528

Port of New York

[Defendant's motion to dismiss granted.]

(Dated December 17, 1976)

Serko & Simon (*Gerald B. Horn* of counsel) for the plaintiffs.

Rex E. Lee, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

Memorandum Opinion and Order

Watson, Judge: These actions, whose recent history has become a saga requiring a seventeen page appendix to recount,* are the subject of defendant's motion to dismiss for lack of jurisdiction.

I find in each case the nominal or ostensible plaintiff was not the party which brought the action to court although it *was* the party which made the entries, paid the duties and filed the protests. These actions were commenced by corporations which were purchasers of the assets and choses in action of the duty-paying corporation. It thus emerges that these actions were not commenced and are not being conducted by the party entitled to do so by law.

In Court No. 71-12-01923 the action was apparently started by Universal Marion Corp. (UMC) on December 1, 1971 with Parksmith Corp. (Parksmith) as the nominal plaintiff. The action was started

*Appendix to the memorandum in support of defendant's motion to dismiss.

more than two years after Parksmith's assets and choses in action had been sold to UMC and almost two years after Parksmith itself had been formally dissolved.

In 73–5–01231 and 73–12–03528 the actions were started by Enco National Corp. (ENCO) on May 16, 1973 and December 26, 1973 respectively, with UMC's Parksmith division as nominal plaintiff. In fact, UMC had sold the assets and choses in action of its Parksmith division to ENCO at the end of 1972, well before the commencement of the actions in court.

The right of legal action against the United States to contest the denial of a protest and to obtain a refund of customs duties is not granted to a party lacking some direct connection to the customs transaction at issue. See, 28 U.S.C. § 1582 (a), (c) in conjunction with 19 U.S.C. § 1514(b). No evidence has been offered which shows any direct involvement by UMC or ENCO in the customs transactions underlying the actions they started in court. In such circumstances they could not acquire the right of action solely by virtue of having purchased assets and choses in action.

Were this not enough, an obstacle to the prosecution of these claims exists in the form of the Assignment of Claims Act, 31 U.S.C. § 203, which, as a precedent to the valid assignment of a claim against the United States requires the existence of certain conditions and the performance of acts which are out of the question here. See, *Hager v. Swayne*, 149 U.S. 242 (1893).

For the reasons expressed above, it is

ORDERED, ADJUDGED AND DECREED that these actions are dismissed for lack of jurisdiction.

(C.D. 4679)

JOHN V. CARR & SON, INC. *v.* UNITED STATES

Plastic pipe flanges

Plastic pipe flanges were classified under item 770.10 as other articles not specifically provided for of *reinforced* plastics. Plaintiff contended that the flanges were properly classifiable as articles not specially provided for of plastics. In opposing the government's classification, plaintiff pointed out that by virtue of headnote 2(ii) to schedule 7, part 12, subpart A of the tariff schedules which governs item 770.10, the plastic flange, in order to come within the purview of that item, must be comprised of a *fibrous* reinforcing material such as *fibrous* glass. In this setting, plaintiff argued that the chopped strands of fiber glass which were used in the manufacture of the flange to reinforce the plastic were not a *fibrous* material. *Held* that the imported flanges were properly classified by the government under item 770.10 on the basis that chopped *fiber*

glass strands are a form of *fibrous* glass material within the meaning of the tariff schedules.

COMMON MEANING—FIBROUS GLASS

Congress intended the terms fibrous glass and fiber glass to be used interchangeably. They are synonymous for tariff schedule purposes.

Court Nos. 70/5763, etc.

Port of Detroit

[Judgment for defendant.]

(Decided December 21, 1976)

Cross, Wrock, Miller & Vieson (*Nathan B. Driggers* and *William D. Belski* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Joseph I. Liebman* and *Ira J. Grossman*, trial attorneys), for the defendant.

MALETZ, Judge: This action comprises seven consolidated protests which raise the question as to the proper tariff classification of plastic pipe flanges imported from Canada in 1969 and 1970. The merchandise was classified by the government under item 770.10 of the Tariff Schedules of the United States, as modified by T.D. 68–9, as articles not specially provided for, wholly or almost wholly of reinforced or laminated plastics, other, and assessed duty of 16 cents per pound plus 13.5 percent ad valorem or 14.5 cents per pound plus 11.5 percent ad valorem, depending upon the date of entry.

Plaintiff contends that the imported flanges are properly dutiable under item 774.60, as modified by T.D. 68–9, as articles not specially provided for, of rubber or plastics, other, at the rate of 13.5 percent or 11.5 percent ad valorem, depending upon the date of entry.

The pertinent provisions of the tariff schedules are as follows:

Classified under:

Schedule 7, Part 12, Subpart A

Subpart A headnotes:

* * * * * * *

2. For the purposes of the tariff schedules, the term "reinforced or laminated plastics" means—

* * * * * * *

(ii) rigid plastics comprised of imbedded fibrous reinforcing material (such as paper, fabric, asbestos, and fibrous glass) impregnated, coated or combined with plastics usually by the application of heat or heat and low pressure.

* * * * * * *

770.10	Articles not specially provided for wholly or almost wholly of reinforced or laminated plastics:	
	* * * * * * *	
	Other	16¢ per lb.+ 13.5% ad val. [1969] 14.5¢ per lb.+ 11.5% ad val. [1970]

Claimed under:

Schedule 7, Part 12, Subpart D

*	* * * * * *	*
774.60	Articles not specially provided for, of rubber or plastics:	
	* * * * * * *	
	Other	13.5% [1969] 11.5% [1970]

Against this statutory background, there are two issues in the case: (1) whether the imported flanges are comprised of "imbedded *fibrous* reinforcing material" within the meaning of headnote 2(ii) of schedule 7, part 12, subpart A, *supra;* and (2) whether the foregoing headnote excludes from its scope articles *not* produced by the application of heat and low pressure. As to these issues, plaintiff contends that chopped strands of fiber glass which are used in the manufacture of the flange to reinforce the plastic are *not* a *fibrous* material. Plaintiff further argues that powdered asbestos which is used in the manufacture of the flanges provides no reinforcement to the plastic and is thus not a reinforcing material within the meaning of headnote 2(ii). Finally, plaintiff insists that since the imported flanges are always made with the application of heat and *high* pressure, i.e., pressure between 1,000 and 4,000 pounds per square inch, the flanges do not come within the scope of headnote 2(ii).

The record consists of the testimony of three witnesses for plaintiff,[1] two for defendant,[2] and 22 exhibits. The record shows that the flanges were produced in Canada by Protective Plastics, Limited, and imported into the United States by plaintiff as customhouse broker. The flanges ranged in size from ¾ to 24 inches in diameter and were used mainly to

[1] Plaintiff called Paul Szasz, president of Protective Plastics, Limited, the manufacturer of the importations; Charles H. Angell, a consultant on reinforced plastics; and Derek E. Fiddes, sales manager for Protective Plastics, Limited.

[2] Testifying for defendant were Carl H. Luther, a technical service engineer in the fiber glass division of PPG Industries, a leading producer of domestic fiber glass; and Irving Sporn, chief chemist of the physical testing and inorganic branch of the United States Customs Service Laboratory in New York City.

connect reinforced plastic pipe and to serve as nozzles and flanged connections to other reinforced plastic equipment.

The flanges were manufactured from a mixture of polyester resin, chopped fiber glass strands, asbestos and other chemicals. Initially benzol peroxide, a catalyst, and stabilizer chemicals were added to the polyester resin, and these ingredients were subjected to a mechanical mixing process. Color pigments and asbestos powder were then added to the mixture and finally, while the mixture was still in motion, fiber glass chopped strands were added until the mix had a dough-like consistency. This mix was hand-packed into the female die of a molding press. Both the male and female portions of the die were then heated to between 280° and 320° Fahrenheit and the press was hydraulically activated for a preset time compressing the substance at a pressure which ranged between 1,000 and 4,000 pounds per square inch. When the press opened, the operator removed the rigid cured flange which had been formed. The flange was never made by the application of heat alone, and pressures between 1,000 and 4,000 pounds per square inch were always used in conjunction with the heat. The use of pressures of that magnitude is now common in the reinforced plastics industry.

The chopped strands of fiber glass which were added to the polyester resin consisted of many parallel monofilaments or fibers of glass that individually measured about one-hundred thousandths of an inch in diameter. Each strand contained from 50 to 400 individual fibers which could be separated from one another. The chopped strands were made from continuous fiber glass strands by cutting these strands at predetermined lengths, e.g., ¼- or ½-inch strands.

Plaintiff's witness Angell testified that the chopped strands were not fibrous. In his opinion, to be fibrous a material must have fibers that extend in more than one direction and thus are randomly arranged. Hence, he concluded that the chopped strands were not fibrous because all the fibers within a given strand were parallel. Plaintiff's witness Szasz agreed that the chopped strands were not fibrous on the ground that they were individual loose strands rather than strands which were matted or bonded together in a random fashion.

In contradistinction, both witnesses for defendant testified that the terms fiber glass and fibrous glass are synonymous and that chopped strands are fibrous because they are composed of many individual filaments or fibers. Defendant's witness Luther further noted that the fibrous nature of the chopped strands can be revealed by twisting a single strand in one's hand and pulling the fibers apart. He emphasized that fibrous glass can be composed of parallel as well as nonparallel fibers.

In sum, plaintiff, while conceding that chopped strands of fiber glass are reinforcing material, maintains that in their common meaning they do not constitute a *fibrous* reinforcing material on the ground that the fibers are parallel rather than randomly arranged. Defendant, on the other hand, contends that in their common meaning the terms fibrous glass and fiber glass are interchangeable. For the reasons that follow, the court must agree with the defendant's position.

The law governing the common meaning of tariff terms is well stated in Sturm, *A Manual of Customs Law* (1974), p. 202:

> Tariff terms are to be construed in accordance with their common and commercial meanings, which are presumed to be the same. *Meyer & Lange et al.* v. *United States*, 6 Ct. Cust. Appls. 181, T.D. 35436 (1915); *August Bentkamp* v. *United States*, 40 CCPA 70, 78, C.A.D. 500 (1952); *United States* v. *M. & D. Miller, Inc.*, 41 CCPA 226, C.A.D. 556 (1954); *United States* v. *Victoria Gin Co., Inc. et al.*, 48 CCPA 33, C.A.D. 759 (1960); *Floral Arts Studio et al.* v. *United States*, 46 CCPA 21, C.A.D. 690 (1958); *United States* v. *C. J. Tower & Sons*, 48 CCPA 87, C.A.D. 770 (1961). Congress is presumed to know the language of commerce, and to have framed tariff acts so as to classify commodities according to the general usage and denomination of the trade. *Nylos Trading Company* v. *United States*, 37 CCPA 71, C.A.D. 422 (1949).
>
> In the interpretation of tariff laws, words are to be taken in their commonly received and popular sense, in the absence of a contrary legislative intent, or proof of a commercial designation, if that differs from the ordinary understanding of the term. *Hummel Chemical Co.* v. *United States*, 29 CCPA 178, 183, C.A.D. 189 (1941); *F. F. G. Harper Co.* v. *United States*, 29 CCPA 268, 271, C.A.D. 201 (1942); *Armand Schwab & Co., Inc.* v. *United States*, 32 CCPA 129, 132, C.A.D. 296 (1945); *United States* v. *Esso Standard Oil Co.*, 42 CCPA 144, 151, C.A.D. 587 (1955); *United States* v. *Tropical Craft Corp.*, 42 CCPA 223, C.A.D. 598 (1955); *United States* v. *C. J. Tower & Sons*, 44 CCPA 1, 4, C.A.D. 626 (1956); *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973).

With regard to whether Congress intended the terms fibrous glass and fiber glass to be used interchangeably, it is not without significance that headnote 1(iii) of schedule 7, part 12, subpart A reads:

> 1. This subpart does not cover—
>
> * * * * * * *
>
> (iii) certain products of *fibrous glass* provided for in part 3A of schedule 5. [Emphasis added.]

Turning to part 3A of schedule 5, the following types of *fibrous glass* are provided for in item 540.71 of that part:

> Glass fibers in bulk; glass fibers in the form of mats, batts, blankets, felts, pads, casings and boards, all the foregoing, of a

> density not over 25 pounds per cubic foot, whether or not coated, impregnated, or bonded with glue, plastics, or other substances, or lined, backed, or supported with paper, paperboard, fabrics or similar material, or with metal mesh or foil; glass-fiber filters, with or without their frameworks or supports; and *articles not specially provided for, of glass fibers.* [Emphasis added.]

Since the tariff schedules thus cross reference all articles of glass fibers as fibrous glass, it is evident that the legislative intent was to use the terms fiber glass and fibrous glass interchangeably. This comports with the common meaning of the term as it appears in various lexicographic authorities. For example, *Webster's Third New International Dictionary* (1963) defines *fiber glass* as (p. 843):

> glass in fibrous form used in making various products (as glass wool, yarns, textiles); for example, *fiber glass* insulation, a fiber glass boat—called also *fibrous glass, spun glass.*

The same edition of *Webster's* defines "fibrous glass" as "FIBER GLASS." *Id.* at 844.

In addition, the *Encyclopedia of Basic Materials for Plastics* contains a table of "forms of *fibrous glass*," which lists "*chopped strands*" along with the various other forms. The *Encyclopedia of Basic Materials for Plastics*, p. 253 (Simonds and Church ed. 1967). [Emphasis added.]

Defendant's witnesses agreed with the above definitions and testified that the term fibrous glass and fiber glass are synonymous in the industry.[3] At the very least, this testimony supports the presumption that the commercial meaning of the term "fibrous glass" is the same as the common meaning.

Plaintiff, however, relies on the doctrines of *noscitur a sociis* and *ejusdem generis*. It points out that "paper" "fabric," and "asbestos" are generally made up of randomly arranged fibers and asserts that these rules require that "fibrous glass," the remaining example of imbedded fibrous reinforcing material contained within headnote 2(ii), be made up of randomly arranged fibers as well. However, plaintiff overlooks the fact that these rules of construction may only be applied where they are needed to resolve an ambiguity. The rules are not applicable where the legislative intent as to the meaning of a word or phrase is clear; like all principles of construction, they are to be used only as an instrumentality for determining the legislative intent in cases where it is in doubt. *J. F. Goldkamp & Co.* v. *United States*, 39 Cust. Ct. 420, 421, Abs. 61194 (1957); *Nomura (America) Corp.* v. *United States*, 62 Cust. Ct. 524, C.D. 3820, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, C.A.D. 1007, 435 F. 2d 1319 (1971).

[3] Defendant's witness Luther added that for a time the term "fibrous glass" was used in the industry in order to avoid using the term "fiberglas" which was a trademark name belonging to the Owens-Corning Fiberglas company.

See also, e.g., *United States* v. *Simon Saw & Steel Co.*, 51 CCPA 33, 37, C.A.D. 834 (1964); *United States* v. *Urdika Wire Die Works*, 19 CCPA 182, T.D. 45292 (1931). There is no ambiguity in this case with respect to the meaning of "fibrous glass." It has been shown above that chopped fiber glass strands are "fibrous glass" according to all available authority. In these circumstances, plaintiff may not resort to the doctrine of *noscitur a sociis* or *ejusdem generis* to create an artificial distinction between parallel fibers and non-parallel fibers in order to defeat the common meaning of "fibrous glass."

In summary, the evidence overwhelmingly supports defendant's contention that chopped fiber glass strands are a form of fibrous glass and that the imported merchandise contains fibrous glass reinforcing material.[4]

Finally, plaintiff points out that the imported flanges are subjected to pressures of from 1,000 to 4,000 pounds per square inch during their manufacture—which pressures are alleged to be high. In this context, plaintiff argues that headnote 2(ii) of schedule 7, part 12, subpart A, *supra*, *requires* that an article be *usually* produced by the application of heat and low pressure in order to come within that headnote's definition of reinforced plastic. This argument, however, is without merit as the very wording of the headnote clearly demonstrates. The headnote reads:

> (ii) rigid plastics comprised of imbedded fibrous reinforcing material (such as paper, fabric, asbestos, and fibrous glass) impregnated, coated or combined with plastics usually by the application of heat or heat and low pressure.

Plaintiff interprets the headnote to mean that any particular article covered thereby *must be usually* made with heat and low pressure. What this language really amounts to, however, is a statutory recognition of the fact that reinforced plastics *are usually* formed by the application of heat or heat and low pressure. Implicit in the language of the headnote is the further recognition that reinforced plastics are not always formed under low pressure. It cannot be seriously contended that Congress would, as plaintiff argues, draft a statute which bases classification on whether an article is "usually" or "sometimes" or "rarely" manufactured in a given way, since such a statute would necessarily be incurably nebulous and imprecise.

It is also interesting to note that although plaintiff argues that all articles covered by item 770.10 *must* be produced by the application of heat and low pressure, plaintiff's exhibit 2 (R. 46)—which plaintiff

[4] In view of the conclusion that the chopped glass strands are a form of fibrous glass reinforcing material, it is unnecessary to reach the question as to whether or not the asbestos powder is likewise a fibrous reinforcing material.

claims is illustrative of the type of article covered by item 770.10—is produced by the application of low pressure and *no* heat (R. 162). Thus, plaintiff's exhibit 2, without more, refutes plaintiff's argument.

For the foregoing reasons, it is concluded that the flanges in issue were properly classified by the government under item 770.10 as other articles not specially provided for, wholly or almost wholly of reinforced or laminated plastics. Plaintiff's claim is overruled and judgment will be entered accordingly.

(C.D. 4680)*

MINOX CORPORATION D/O BERKEY PHOTO, INC. *v.* UNITED STATES

Opinion on Defendant's Motion to Sever and Dismiss

Court No. 74-8-02145

Port of New York

[Defendant's motion granted in part.]

(Dated December 22, 1976)

Serko & Simon (*Gerald B. Horn* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

NEWMAN, Judge: Pursuant to rules 4.7(b) and 4.12 defendant has moved for an order severing and dismissing this action as to protest Nos. 1001-4-000355, 1001-4-002370 and 1001-4-002371.

For the reasons stated below, defendant's motion is granted in part.

The pertinent statutory provisions read:

> 19 U.S.C. § 1514(b)(1)(1970):
>
> (1) * * * Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. * * *
>
> 28 U.S.C. § 1582(c) (1970):
>
> (c) The Customs Court shall not have jurisdiction of an action unless (1) * * * a protest has been filed, as prescribed by section 514 [19 U.S.C. § 1514] of the Tariff Act of 1930, as amended, * * *.

Plainly, the intent of section 1514(b)(1) is to require an importer to present all claims arising out of the liquidation of any entry in a single protest, unless there are different categories of merchandise in the entry, in which event a separate protest may be filed for each

category. Consequently, the issue raised by defendant's motion is whether the three protests identified above cover a category of merchandise which is the subject of other protests in contravention of section 1514(b)(1).

Protest No. 1001–4–000354 (covered by Court No. 74–8–02136) relating to entry No. 185251 covers film, while protest No. 1001–4–000355 relating to the same entry, covers clamps and tripods. Thus, the two protests were properly filed for different categories of merchandise. Defendant's motion to dismiss this action as to protest No. 1001–4–000355, accordingly, is denied.

Plaintiff contends that protest No. 1001–4–002368 (also covered by Court No. 74–8–02136) is limited to cameras in entry K325543. However, the protest states that the appraised value should be the invoice unit value less 2%, reflecting the correct additions for profit and general expenses, but there is no mention of cameras or any other specific category of merchandise. The claim that "[a]n addition of 10% for possible higher expenses for general expenses in sales for domestic consumption following CAD 1081 * * * is no longer valid" does not confine the scope of the protest to cameras, particularly in view of a worksheet accompanying the entry papers which shows that the 10% addition also applied to clamps and tripods. Where, as in protest No. 1001–4–002368, plaintiff fails to limit its claim to a particular category of merchandise, it may be assumed, unless clearly shown to the contrary, that the protest is not limited to merely one item of merchandise in the entry. Here, such contrary showing has not been made by plaintiff respecting protest No. 1001–4–002368. Hence, protest Nos. 1001–4–002370 and 1001–4–002371, covering respectively binocular clamps and tripods with clamps in entry K325543, are severed, and this action is dismissed as to those protests.

In sum, it is clear that section 1514(b)(1) permits importers to file separate protests where the entry covers merchandise of different categories, as contended by plaintiff. By the holding herein, the court does not intend to discourage the permissible practice of filing separate protests covering different categories of merchandise in an entry; nor does the court intend that the framing of claims in separate protests involving the same entry be a complex or arduous task. On the contrary, Congress intended in the Customs Courts Act of 1970 (P.L. 91–271) to simplify the importers' problems to the extent that, unlike the practice prior to October 1, 1970, importers may now challenge liquidations in a single protest, whether the claim arises out of the appraised value of the merchandise or its classification, or both such "decisions." Nevertheless, it should be emphasized that where, as here, separate protests are filed involving the same entry, the plaintiff must comply with the statutory prerequisite that *separate categories* of merchandise be covered by *each* protest.

The court wishes to make it plain—and stresses—that the court does not intend to place any unnecessary barriers in the path of importers. However, here, the court has no alternative and is constrained to agree with the defendant's contention that plaintiff has not shown compliance with the statute respecting the two severed protests herein.

Defendant's motion, therefore, is granted in part; and denied in part, as noted above.

Order signed.

(C.D. 4681)

KAROWARE, INC. *v.* UNITED STATES

Wood products

Merchandise consisting of wine racks, and different types of wooden bars, imported together with glassware, and some with bar tools as well, was classified under different provisions of the tariff schedules, either as articles or other household utensils of wood, not specially provided for, or as boxes, cases or chests of wood. Plaintiff claimed the articles should have been classified as "furniture" under item 727.35 of the schedules dutiable at 9, 8 or 7 per centum ad valorem, and that the glassware, separately classified under items 546.52 and 546.54 at various rates, depending upon the date of entry, should have been classified as entireties with the bars with which imported. Bars imported with bar tools as well as glassware, classified as "sets" under item 651.75 of the schedules, were claimed to be properly classifiable as entireties as boxes, cases, or chests of wood, or as separately dutiable articles. HELD: Plaintiff failed to rebut the statutory presumption of correctness, and its claims are overruled.

FURNITURE—DEFINITION

The scope of the "furniture" provision (item 727.35 of the tariff schedules) is governed by the definition in headnote 1 of schedule 7, part 4, subpart A, which is both exclusionary and restrictive, and embraces only those articles expressly described. *Morris Friedman & Co.* v. *United States*, 69 Cust. Ct. 184, C.D. 4392, 351 F. Supp. 611 (1972).

As to the *wine racks*, the evidence of record established that they could easily be used on a table as well as on the floor, and that they were not "movable articles of utility, designed to be placed on the floor." Use of the word "designed" evidenced the intention of Congress to include only those articles that were particularly and especially constructed to be placed on the floor or ground. The test is not met merely because an article is susceptible or capable of being placed on the floor or ground. See *Sprouse Reitz & Co., Frank P. Dow Co., Inc.* v. *United States*, 67 Cust. Ct. 209, C.D. 4276, 332 F. Supp. 209 (1971).

As to the *bars*, plaintiff's claim that they were included in the headnote definition of "furniture" as "kitchen cabinets and similar cupboards," fails to meet the criterion that they be capable of

being permanently fastened to the wall and not movable at will. Although the evidence established that the bars could be hung on walls, none had features for permanent attachment. See *Albert E. Price, Inc.* v. *United States*, 68 Cust. Ct. 50, C.D. 4334 (1972), *aff'd*, 60 CCPA 127, C.A.D. 1095, 476 F. 2d 1354 (1973).

ENTIRETIES

Plaintiff's testimony failed to establish that the bars, glassware and tools were designed as a unit or that they were subordinated to create a new article of commerce that bears a name different from any of its parts. The bars, glassware and bar tools all retained their separate and distinct functions. See *Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, C.A.D. 894 (1966).

"SETS"—ITEM 651.75, TARIFF SCHEDULES

In the adoption of the "sets" provision it was not the intention of Congress to restrict its application only to similar items; rather it includes items, though dissimilar, which naturally complement one another in use. The book and wonder bars were designed to hold glassware and bar tools, each of which were intended to be used in conjunction with and to complement one another, in the storage, preparation and serving of beverages. The bars, glassware and bar tools were not "simply an aggregation of disparate articles imported together for shipping convenience," but were clearly "a collection of articles which naturally complement each other, and usually go together." *Tanross Supply Co., Inc.* v. *United States*, 58 CCPA 26, C.A.D. 1000, 433 F. 2d 1332 (1970).

STATUTORY CONSTRUCTION: WISDOM OF STATUTE OR LEGISLATIVE POLICY NOT A JUDICIAL QUESTION

Although an importer is made to pay the higher rate of duty for importing articles in a "set," which, if imported separately, would bear a lower rate of duty, it is clearly a policy determination within the exclusive province of the Congress. See *Authentic Furniture Products, Inc.* v. *United States*, 68 Cust. Ct. 204, 210, C.D. 4362, 343 F. Supp. 1372, *aff'd*, 61 CCPA 5, C.A.D. 1109, 486 F. 2d 1062 (1973). In areas of unquestioned constitutional authority, the judicial function to construe legislation does not include the power to judge the wisdom of the statute, or the legislative policy that prompted its enactment.

Court Nos. 72-3-00736, etc.

Port of New York

[Judgment for defendant.]

(Decided December 23, 1976)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John A. Gussow* and *Robert Masters*, trial attorneys), for the defendant.

RE, Judge: The question presented in these four cases, consolidated for the purposes of trial, pertains to the proper classification,

for customs duty purposes, of certain merchandise exported from Japan during 1968, 1969 and 1970. The merchandise consists of wine racks, and different types of wooden bars, imported together with glassware, and some with bar tools.

The various articles, invoiced as wine racks, keg bars, castle bars, tavern bars, executive roll top desk bars, small keg bars, treasure chest bars, cube bars, wine barrel bars, and bookshelf bars, were classified by the customs officials under different provisions of the Tariff Schedules of the United States [TSUS] as:

> a) other household utensils not specially provided for, of wood, under item 206.97, TSUS, as modified by T.D. 68–9, with duty at the rate of 15, 13 or 11.5 per centum ad valorem;
> b) boxes, cases or chests of wood, under item 204.40, TSUS, with duty at the rate of 16⅔ per centum ad valorem; or
> c) articles of wood, not specially provided for, under item 207.00, TSUS, as modified by T.D. 68–9, with duty at the rate of 10 per centum ad valorem.

Plaintiff protested these classifications, and claimed that the articles should properly have been classified as furniture under item 727.35, TSUS, as modified by T.D. 68–9, and assessed with duty at the rate of 9, 8 or 7 per centum ad valorem. At the trial, however, plaintiff abandoned its "furniture" claim as to all of the bars except the keg bars, the castle bars, the tavern bars, the executive roll top desk bars,* and the bookshelf bars.

Merchandise invoiced as glassware, consisting of shot glasses, decanters and beakers, imported together with the bars, was separately classified as glassware under items 546.52 and 546.54, TSUS, with duty at various rates, depending upon the date of entry. Plaintiff claims that the glassware should have been classified as entireties with the bars with which imported. Hence, it is claimed that the glassware is dutiable at the rate at which the bars were assessed, or at the rate of the classification claimed to be correct for them.

The importations also consisted of cask bars which were also classified under two of the three aforesaid provisions for wood, except in one instance when they were classified as "furniture" under item 727.35 of the schedules. In addition to the glassware imported with the cask bars were ice buckets classified as articles not specially provided for, of aluminum, under item 654.10, TSUS, and tongs classified as hand tools, of iron or steel, under item 651.47, TSUS, assessed at various rates. The ice buckets and tongs were also claimed by plaintiff to be dutiable as entireties with the cask bars and glassware at the assessed rates with respect to the cask bars.

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*The executive roll top desk bars in entry no. 276802 were classified under item 206.97 and in entry no. 371216 under item 207.00. The defendant admits error in the latter classification and submits that the bars are classifiable under item 206.97. This claim, however, was made in defendant's brief and, therefore, is not an issue before the court.

The merchandise in issue also included book bars and wonder bars. These bars were imported not only with glassware, but also with a set of bar tools consisting of a corkscrew, bottle opener, spoon and strainer or olive pick which were packed together in a cardboard box but not fitted. These bars were classified under item 651.75, TSUS, as sets, dutiable at the highest rate applicable to the articles in the sets subject to the highest rate of duty, i.e., the glassware (at 50 per centum ad valorem under item 546.52, TSUS) in accordance with schedule 6, part 3, subpart E. Plaintiff claims that the book and wonder bars were improperly classified, and should have been dutiable "as entireties, with their glassware and tools, as boxes, cases, or chests of wood under item 204.40 or, as separately dutiable articles, under the same provision, with the glassware being classified under either item 546.50 or 546.54, depending upon its value."

The classification, and hence the rate of duty to be assessed on the imported merchandise, depend upon the answers to three main questions that are presented for the court's determination.

The first is whether the wine racks, the keg bars, the castle bars, the tavern bars, the executive roll top desk bars, and the bookshelf bars are "furniture," within the meaning of that term as used in the tariff schedules.

The second is whether all of the bars are dutiable as entireties, with the glassware, or with the glassware and bar tools, with which they were imported.

The third is whether the book bars and wonder bars were improperly classified as "sets" together with their glassware and bar tools.

At the trial plaintiff called two witnesses and introduced 21 exhibits, which included representative samples of the wine racks and all of the bars in issue. The defendant introduced four exhibits.

Plaintiff's "furniture" claim: pertinent provisions

On the first question presented, whether the wine racks and the five bars constitute "furniture," the pertinent provisions of the tariff schedules read as follows:

Classified under:		
Schedule 2, part 1:		
	"Jewelry boxes, silverware chests, cigar and cigarette boxes, microscope cases, tool or utensil cases, and similar boxes, cases, and chests, all the foregoing of wood:	
	* * * * * * *	
	Other:	
204.40	Not lined with textile fabrics---	16¾% ad val.
	* * * * * * *	

	Household utensils and parts thereof, all the foregoing not specially provided for, of wood:	
	* * * * * * *	
206.97	Other	15, 13, 11.5% ad val.
	* * * * * * *	
207.00	Articles not specially provided for, of wood	10% ad val."

Claimed under:

"Furniture, and parts thereof, not specially provided for:

* * * * * * *

Of wood:

* * * * * * *

Other:

* * * * * * *

727.35	Furniture other than chairs	9, 8, 7% ad val."

Schedule 7, part 4, subpart A, headnote:

> "1. For the purposes of this subpart, the term 'furniture' includes movable articles of utility, designed to be placed on the floor or ground, and used to equip dwellings, offices, restaurants, libraries, schools, churches, hospitals, or other establishments, aircraft, vessels, vehicles, or other means of transport, gardens, patios, parks, or similar outdoor places, even though such articles are designed to be screwed, bolted, or otherwise fixed in place on the floor or ground; and kitchen cabinets and similar cupboards, seats and beds, and sectional bookcases and similar sectional furniture, even though designed to be fixed to the wall or to stand one on the other; * * *."

Plaintiff's "furniture" claim as to wine racks

There is no dispute that the articles are in chief value of wood.

Both parties cite with approval, and agree with the reasoning and holding of this court in *Morris Friedman & Co.* v. *United States*, 69 Cust. Ct. 184, C.D. 4392, 351 F. Supp. 611 (1972). The question presented in the *Morris Friedman* case pertained to the dutiable status of rattan hanging chairs. Plaintiff contended that the hanging

chairs were embraced within prior judicial determinations of the common meaning of the term "furniture," and that Congress, by the adoption of the headnote provision in schedule 7, part 4, subpart A, did not intend to restrict the classification of furniture to the articles specifically enumerated. The defendant argued that, whether or not the imported articles came within the common understanding of "furniture," that term was statutorily limited by the headnote provision which set forth a restrictive definition that excluded the hanging chairs from classification as "furniture." The question, therefore, was squarely presented whether the headnote provision pertaining to "furniture" constituted a statutory definition restricting the articles classifiable as "furniture."

In overruling plaintiff's claim, the court concluded that the hanging chairs did not come within the purview of the headnote, and, consequently, were not classifiable as "furniture." Hence, this court held that the scope of the "furniture" provision of the tariff schedules is governed by the definition in headnote 1, that the headnote is both exclusionary and restrictive, and that it embraces only those articles expressly described.

The holding of the *Morris Friedman* case makes it clear that earlier judicial determinations, whether an article was "furniture" under previous tariff laws, are neither binding nor dispositive of the question whether the wine racks or the five bars are "furniture" under the tariff schedules.

Plaintiff asserts that the merchandise in question comes within the purview of the headnote definition since the record clearly shows that the wine racks are "movable articles of utilities designed to be placed on the floor," and that the bars are "kitchen cabinets and similar cupboards * * * designed to be fixed to the wall."

The defendant argues that, even if the court should find that the wine racks (and bars) are embraced by the headnote definition of "furniture," it must also be established that they are of a comparatively substantial nature and fulfill a comparatively important role for personal use, convenience, and comfort.

The wine rack is made of hard wood with a walnut finish. It consists of two parallel boards embedded in a stand, each board containing ten cylindrical holes. The boards are held together by three cross bars, two at the bottom and one at the top. The cylindrical holes are intended to hold wine bottles in a flat, cradled position for storage purposes. The overall measurements of the wine rack are 24 by 11 by 14 inches.

Plaintiff's first witness, Mr. Shulman, testified that he was plaintiff's warehouse and traffic manager for six years, and that his duties included receiving, shipping, inspecting and packing the imported merchandise. He was familiar with the products imported by plaintiff

and, although he does not own one, he has seen the wine rack displayed on the floor. He stated that it was used on the floor because if it were higher "anybody can knock the thing over and then you've got a lot of damage on the floor." On cross-examination, he conceded that the wine rack could be used on a table as well as on the floor.

Plaintiff's other witness, Mr. Baller, whose duties were similar to those of an "overseer," was the sole stockholder and president of the plaintiff corporation. He agreed with Mr. Shulman that the wine rack is used on the floor, and stated that "otherwise, if you put [it] anywhere else, at any height, the bottles would break from the usage."

Plaintiff contends that it has successfully proven that the imported wine racks are "movable articles of utility designed to be placed on the floor," and are thus properly classifiable under the headnote provision for "furniture." Defendant, on the other hand, maintains that the record falls short of establishing that the wine racks were designed to be, or must be used on the floor or ground, or that they are of a substantial nature and fulfill a comparatively important role for personal use, convenience and comfort.

It is not disputed that the articles are "movable articles of utility." The question is whether they are "designed to be placed on the floor or ground." Research reveals that while the language of the pertinent headnote definition has been the subject of recent judicial decisions, this particular question is one of novel impression.

The Brussels Nomenclature greatly influenced the arrangement and classification of the tariff schedules. The Brussels Nomenclature and its Explanatory Notes are therefore indicative of the legislative intent underlying the tariff schedules. See *Herbert G. Schwarz, dba Ski Imports* v. *United States*, 57 CCPA 19, C.A.D. 971, 417 F. 2d 1391 (1969).

In the case of *Sprouse Reitz & Co., Frank P. Dow Co., Inc.* v. *United States*, 67 Cust. Ct. 209, C.D. 4276, 332 F. Supp. 209 (1971), cited by the defendant, this court noted the similarity of provisions of the Brussels Nomenclature and the tariff schedules on the subject of furniture.

> "Chapter 94.00 of the *Explanatory Notes to the Brussels Nomenclature* 1955, Volume 3, pages 1145–1146 (1964), contains the following pertinent language:
>
> For the purposes of this Chapter, the term *'furniture'* is to be taken to mean:
>
> (A) Any 'movable' articles (*not* included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches,

schools, cafés, restaurants, laboratories, hospitals, dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be 'movable' furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships.) Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

(B) The following even if they are designed to be fixed to the wall or to stand one on the other:
(i) Kitchen cabinets and similar cupboards.
(ii) Folding seats and beds.
(iii) Unit bookcases and similar unit furniture.

Except for the goods referred to in sub-paragraph (B) above, the term 'furniture' is to be taken *not to apply* to articles used as furniture but designed for placing on other furniture or shelves or for hanging on walls. It therefore follows that the present Chapter *does not cover* other wall fixtures such as coat and hat racks, wall racks, key-boards, clothes-brush hangers and newspaper racks, nor furnishings such as radiator screens. Similarly, the Chapter *excludes* the following types of goods *not* designed for placing on the floor:—small articles of cabinetwork and small furnishing goods of wood (*heading 44.27*), and office equipment of base metal (e.g., sorting boxes, paper trays) (*heading 83.04*)." (Emphasis in original.) 67 Cust. Ct. at 215.

The Explanatory Notes indicate that the type of articles that are embraced by the statutory definition of "furniture" are expressly described as "movable articles" of utility designed to be placed "on the floor or ground," and that the only exceptions are certain enumerated articles. Moreover, specifically excluded are articles used as furniture, but designed for placing on other furniture or shelves, or for hanging on the walls.

After careful consideration of the relevant testimony and sample, the court is unable to find that plaintiff has borne its burden of proof that the wine racks are included within the pertinent headnote definition.

An examination of the illustrative wine racks reveals clearly that in construction, size, and weight, they can suitably perform the function of holding and storing bottles whether placed on the floor, on top of other furniture, or on a shelf. Indeed, in plaintiff's catalog, the wine rack is shown *standing* on top of a bar.

Plaintiff's witnesses testified that they observed the wine rack in use displayed on the floor. The reason stated was that if it were higher, "anybody can knock the thing over," and there would be damage to the floor. This testimony is not convincing, and, as stated by Mr. Shulman on cross-examination, the wine rack could easily be

used on a table as well as on the floor. The meager testimonial evidence in the record on this point supports the government's classification.

By the use of the word "designed," Congress intended to include only those articles that were particularly and especially constructed to be placed on the floor or ground. This test is not met merely because an article is susceptible or capable of being placed on the floor or ground. Hence, it is unnecessary to consider defendant's argument that, in addition to falling within the headnote provision, the article must be of a comparatively substantial nature and fulfill a comparatively important role for personal use, convenience and comfort.

In view of the foregoing, the court finds that the plaintiff has failed to rebut the presumption of correctness that attaches to the government's classification. Plaintiff's claim as to the wine racks is consequently overruled.

Plaintiff's "furniture" claim as to bars

On plaintiff's claim that the bars also should have been classified as "furniture," the issue to be determined is whether the bars are included in the phrase "kitchen cabinets and similar cupboards * * * designed to be fixed to the wall * * *" within the meaning of the headnote definition of furniture.

Since the record does not suggest any distinctions of substance among the five bars, the following description is sufficiently accurate. The bars are highly decorative and are made of hard wood with either walnut, oak, or natural teak finish. They may be termed novelty articles, designed to resemble or depict the article which bears its name, such as keg, castle, etc. While they therefore differ in external physical appearance, common to all of the bars are shelves, precut with cylindrical holes, designed to hold glassware of various sizes and bottles. All have front door openings, with four of them having two hooks on the top, one at each end, and the other having precut holes in the back, for hanging. Their overall dimensions range 14 to 20 inches in height, 4½ to 13 inches in depth, and 16 to 25½ inches in width.

Plaintiff asserts that the bars are embraced by the common meaning of the term "cupboard," and that they are similar in several significant respects to kitchen cabinets. Defendant urges that they are not similar to kitchen cabinets; that some of the articles are not primarily suited for hanging; and that they are all of minor importance in the home.

In support of its contentions, plaintiff relies heavily on the case of *Albert E. Price, Inc.* v. *United States*, 68 Cust. Ct. 50, C.D. 4334 (1972), *aff'd*, 60 CCPA 127, C.A.D. 1095, 476 F. 2d 1354 (1973). In the *Price* case the court held that "spice cabinets" were not embraced in either the common meaning or the statutory definition of "furni-

ture." Plaintiff, however, states that although the court found that the spice cabinets were not similar in any way to "kitchen cabinets," it nevertheless established a criterion for the words "kitchen cabinets" which plaintiff submits is met by the bars in issue. In support of its position plaintiff refers to its collective exhibit 2 (parts of catalogs of Sears, Roebuck & Company and the J.C. Penney Company) as containing illustrations of articles sold by them as "kitchen cabinets." Plaintiff suggests numerous similarities between the bars in issue and the "kitchen cabinets" depicted, with respect to their dimensions, weight and price.

Defendant indicates that the alleged similarities are specious and that, whereas kitchen cabinets are suitable "for holding many different types of articles," the bars, "because of the pre-drilled holes, are only suitable for holding cylindrical or conical shapes such as glasses." Moreover, defendant states that the bars are "only secondarily suited for hanging, and they are of 'minor importance' to the home."

Whether an importation is embraced by the tariff term "furniture," and particularly the words "kitchen cabinets and similar cupboards" of the headnote provision, was considered in the *Albert E. Price, Inc.* case, *supra*, also relied on by the defendant, and the previously decided *Sprouse Reitz & Co., Frank P. Dow Co., Inc.* case, *supra*.

In the *Sprouse Reitz* case the merchandise consisted of spice racks designed to be hung on the wall, presumably in the kitchen, having shelves intended to hold glass bottles of spices, one of them containing drawers to store tea bags, condiments, or other items. The plaintiff contended that the spice racks came within the common meaning of the term "furniture." The defendant, on the other hand, contended that the headnote provision constituted a statutory definition, and that the spice racks fell outside that definition.

In its opinion the court noted that, although the classification of the spice racks was governed by the tariff schedules, plaintiff's claim was not based on the statutory definition of the term "furniture" as found in the headnote, but rather on the common meaning of the word. From the testimony and the exhibits the court found that the spice racks were more decorative than utilitarian, were offered to the public as accessories to furniture, and were inexpensive. It observed that they could be described as appendages of the house designed for its ornamentation, and as "comparatively minor in importance so far as personal use, convenience and comfort are concerned." Hence, the court held that the spice racks were not included in the headnote provision, nor were they embraced by the common meaning of the term "furniture."

The plaintiff, in the more recent case of *Albert E. Price, Inc., supra*, argued as does the plaintiff here, that the merchandise fell squarely

within the meaning of the term "furniture" as used in the tariff schedules, and that it was also embraced by the words "kitchen cabinets and similar cupboards." The merchandise in the *Price* case consisted of spice cabinets with a louver-door hutch and two drawers at the bottom. The defendant contended that the articles were not embraced by the statutory words.

In finding that the spice cabinets did not come within the meaning of the term "furniture," as used in the tariff schedules, the court stated that they were predominantly similar in nature and use to the spice racks in the *Sprouse Reitz* case, and that *Sprouse Reitz* was, therefore, "*stare decisis* of the issues presented."

In affirming this court's decision in the *Price* case the appellate court inferentially also affirmed this court's decision in *Sprouse Reitz*. Of particular significance to the present case is the following statement of the appellate court in its affirmance of the *Price* case:

> "We share the view so aptly expressed by the Customs Court that:
>
> > '* * * the headnote discussion of furniture was, on its face, intended to certify the inclusion of furniture which was permanently fastened to the premises, either on the floor or on the walls, as opposed to furniture which was movable at will. In this respect, kitchen cabinets and similar cupboards were mentioned as examples of furniture which were capable of permanent placement. * * *' " 60 CCPA at 129–130.

Accordingly, it follows that the criterion for an article to be embraced by the words "kitchen cabinets and similar cupboards" is that it is capable of being *permanently fastened* to the wall and not movable at will, and not merely its shape, size, or dimensions as plaintiff contends.

The subsequent case of *Morris Friedman & Co.* v. *United States*, 69 Cust. Ct. 184, C.D. 4392, 351 F. Supp. 611 (1972) which dealt with rattan hanging chairs, is also pertinent. As noted previously, the court therein held that the headnote provision contained a definition of "furniture" which constituted a restriction upon the articles classifiable as "furniture." Consequently, since the hanging chairs in the *Friedman* case were not designed to be placed on the floor or ground, or to be fixed to the wall, they did not come within the purview of the statutory headnote.

The reasoning and holdings of both the *Morris Friedman* and *Albert E. Price* cases indicate that, for classification as "furniture" within the statutory definition, more is required than that an article have hooks, and that it may possibly be hung from the wall. The precedential authority of those cases leads to the conclusion that the bars in issue are beyond the ambit of the statutory definition. On this aspect of the case suffice it to say that plaintiff's reliance on the *Albert E. Price* case is misplaced.

While it may be true, as plaintiff contends, that perhaps all of the bars fall within the dimensions of "kitchen cabinets," and may be hung on the wall, they do not have features for their permanent attachment to the wall. Furthermore, they are movable at will, and are designed to rest or stand on other furniture. This may be noted by an examination of plaintiff's catalogs which show that the castle bar, and the executive roll top desk bar, are either placed on the floor, or are standing on top of another article or shelf. The catalog states that the executive roll top desk bar is a "wall hanging or table top bar." Plaintiff's witness, Mr. Shulman, testifying about the executive roll top desk bar stated that "you can put it on a flat surface also." As for the keg bar it may be noted that it contains a handle at the top to facilitate its being carried from place to place. An examination of the nature and design of the samples of the imported bars compels the conclusion that it is most unlikely that they would be used as "kitchen cabinets."

Since the court finds that the bars in issue are not "kitchen cabinets," there is no basis for a finding that they are "similar cupboards." Furthermore, the court need not consider defendant's contention that the bars are of comparatively minor importance so far as use, comfort and convenience are concerned.

On the question, therefore, whether the bars are "furniture" under the tariff schedules, it is the determination of the court that the plaintiff has failed to prove the correctness of its claimed classification, and its claim is therefore overruled.

Plaintiff's "entireties" claim

On the second question presented, whether the bars are dutiable as entireties with the glassware with which they were imported, plaintiff states that it has successfully proven that the bars and the glassware comprise a single article of commerce. Hence, plaintiff contends that they should be treated as an entirety for tariff purposes. It bases its contention on the physical and testimonial evidence that each of the bars together with the glassware was imported, designed, purchased, priced, advertised, sold at wholesale and retail, and used as a unit.

Defendant asserts that the record falls short of establishing that the bars and glassware were designed as a unit. Moreover, defendant submits that the facts fail to show that there has been a merger of their functions creating a new article of commerce as required by the customs law doctrine of entireties.

In support of its contention, plaintiff argues that the facts closely resemble those of three recently decided cases: *Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, C.A.D. 894 (1966), *The Nissho American Corp.* v. *United States*, 64 Cust. Ct. 378, C.D. 4005 (1970),

appeal dismissed, 57 CCPA 141 (1970) and *A. N. Deringer, Inc.* v. *United States*, 71 Cust. Ct. 103, C.D. 4482 (1973).

In the *Miniature Fashions, Inc.* case, the imported merchandise consisted of "cabana sets" described as "two-piece shirt-short sets." The appellate court, reversing the decision of this court, held that the garments were classifiable as an entirety since the evidence established that they were designed as a unit, matched as to color, print and fabric, imported as a unit and pinned together, invoiced as a unit, and sold as a unit both in wholesale and retail channels.

On the authority of the *Miniature Fashions* case, this court decided that the merchandise in the *Nissho* and *Deringer* cases was also properly dutiable as entireties.

In the *Nissho* case, the imported merchandise consisted of shirts, which were part of a shirt and longie set. They consisted of a boy's plaid flannel shirt and corduroy pants lined with the same plaid material as the shirt, and having the pocket trimmed with the same material. They were designed, purchased, imported, invoiced, advertised, and sold at wholesale and retail as a unit, and not separately.

The merchandise in the *Deringer* case consisted of so-called "brakini" sets. The sets consisted of unstructured brassieres of stretch material intended to fit all, or a number of sizes, and bikini pants. They were matched as to fabric, color, print, and trim, and were imported in sets. Each set, sold at wholesale and at retail as a set on a hanger, was designed as a unit to be worn together. They were offered in sets to satisfy a consumer demand for coordinated underwear. The upper portion was distinct from sized and structured brassieres which were sold separately.

Defendant submits that the facts of the *Miniature Fashions* and *Deringer* cases are clearly distinguishable from those presented here. It indicates that the merchandise in the cases cited was matched clothing and, when coordinated by color, print and fabric, created a new article of commerce. The bars and the glassware are not "matched" in any corresponding way. In the present case the components of the unit retain their separate and distinct functions: the bars for serving and storing beverages and the glasses for drinking.

Numerous cases can be readily cited that discuss the customs law doctrine of entireties. Although the doctrine may be formulated clearly, its application is not always free from doubt. The difficulty of application is noted in *Lafayette Radio Electronics Corp.* v. *United States*, 57 CCPA 62, C.A.D. 977, 421 F. 2d 751 (1970) wherein the Court of Customs and Patent Appeals stated:

> "* * * there are no ironclad rules of universally applicable principles for determining whether merchandise should be classified and dutied as entireties. * * *" 57 CCPA at 66.

As stated by the appellate court in the *Miniature Fashions* case:

> "The lower court stated, and we agree:
>
> 'The difficulty which is experienced in this type of case is not so much the formulation of a workable rule as it is the application of the provisions thereof to a given factual situation. Where it is apparent that the components of an importation have no useful function until joined into a single entity, it is, of course, relatively easy to say that the result constitutes an entirety. Where, however the several components of a unit are to any extent alone susceptible of a separate use, the question of whether their individual identities are subordinated to the newly created entity is not so readily answered.' " 54 CCPA at 15.

Nevertheless, a useful formula, which has often been cited with approval, is found in *Donalds Ltd.* v. *United States*, 32 Cust. Ct. 310, 315, C.D. 1619 (1954), wherein it was stated:

> "* * * If what is imported as a unit is actually and commercially two or more individual entities which, even though imported joined or assembled together, nevertheless, retain their individual identities and are not subordinated to the identity of the combination, duties will be imposed upon the individual entities in the combination as though they had been imported separately. Conversely, if there are imported in one importation separate entities, which by their nature are obviously intended to be used as a unit, or to be joined together by mere assembly, and in such use or joining the individual identities of the separate entities are subordinated to the identity of the combined entity, duty will be imposed upon the entity they represent."

The testimony of plaintiff's witnesses is to the effect that the bars were imported with the glassware packed separately, and placed inside the bar; they were sold to plaintiff's customers as a unit; retailers displayed and sold them together; and they are used together. When broken glasses have to be replaced, they must be bought from the plaintiff since identical glasses are not available elsewhere. If a customer found a shot glass broken after he opened the keg bar, he would not return the entire bar in order to obtain the replacement for the broken glass, and "the value of the entire bar is not lost because one of the shot glasses is broken." Depending upon the circumstances, there may or may not be a charge for the replacement glasses. The plaintiff orders and purchases the glasses separately from the bars.

On the doubtful question whether the bars and glassware were designed as a unit, plaintiff's first witness, Mr. Shulman, testified that he did not participate in the design of the merchandise, nor did he ever visit the production facilities in Japan.

The other witness, Mr. Baller, on direct examination, testified that the bars were designed as a unit with the glassware. On cross-examination, however, his testimony was inconclusive and less certain.

When asked if the glassware was designed as a unit with the bars, he replied: "They are not designed for any particular bar insofar as it determines the various sizes that we have."

During cross-examination, the witness also testified that the glassware was chosen from catalogs or from submitted samples; all of the glasses in the bars, with the exception of the executive roll top desk bar, were interchangeable; the bars and glassware and the tools are not produced in the same factory in Japan; the plaintiff does not purchase the imported articles from the manufacturers but through an agent who submits to plaintiff the unit price for the articles which are bought in a "package deal." From all of the testimony, some of which is ambiguous and unconvincing, the court cannot find that plaintiff succeeded in establishing that the bars and glassware were designed as a unit.

Even apart from the question whether the bars and glassware were designed as a unit, the facts in the present case differ substantially from those upon which plaintiff relies. In the *Miniature Fashions* case, if one of the parts in the "cabana set" was damaged, the entire set had to be returned for credit or replacement. One component of the set had no value without the other. In the present case, when a glass was broken, it was returned alone without the bar, and the replacement of the glass had no effect upon the value of the bar.

The component parts of the "cabana set" (the shirt and shorts) in the *Miniature Fashions* case; the shirt and longie set (the shirt and pants) in the *Nissho* case; and the "bra-kini" set (the brassiere and bikini) in the *Deringer* case were subordinated to the whole having a single use, and when combined, created a new article of commerce. Moreover, in *Miniature Fashions* and in *Deringer*, the parts, when combined, became known in the trade by a new name, viz., "cabana set" and "bra-kini set." In the present case, the facts do not show that the component parts, the bars and the glassware, have been subordinated to create a new article of commerce which bears a name different from any of its parts. In view of the factual differences, the cases cited by plaintiff are not authority for the classification of the bars and glassware as entireties.

It cannot be disputed that the bars and glassware are separate, and perform their usual functions. The bars are attractive and can be used in the home or office as decorative articles, or for the storage and service of beverages. The glasses of various sizes are interchangeable and can be placed in any one of the bars in which they fit. Additionally, glass, when removed from the bars, can be used for the same purpose as any other glass.

On the exhibits and testimony of record the court finds that the bars and glassware retain their separate identity and function. This

conclusion is supported by two additional cases recently decided by this court: *Mobilite, Inc.* v. *United States*, 70 Cust. Ct. 359, C.R.D. 73–11, 358 F. Supp. 267 (1973) and *Novelty Import Co., Inc.* v. *United States*, 67 Cust. Ct. 447, C.D. 4318 (1971).

In the *Mobilite* case the merchandise consisted of electric light bulbs and lamps which were unassembled but packed together for shipping purposes. They were classified as entireties under item 653.39 of the tariff schedules which provides for "other" illuminating articles. Plaintiff claimed that the lamps and bulbs should have been liquidated separately, the lamps under item 653.39, and the bulbs under the *eo nomine* provisions for bulbs in items 686.90 and 687.30. Defendant contended that the bulbs were correctly classified as a single entity with their lamps.

In holding that they were improperly classified as entireties under item 653.39, the court rejected defendant's argument that both the "power source" (lamp) and "illuminating factor" (bulb) comprise an illuminating article, and thus were a single entity when imported together. The court reasoned that the bulbs were the same as those which were bought and sold in the United States as separate articles. They had a separate commercial value, and, although placed together and shipped with the lamps, they retained their separate tariff identities.

In the *Novelty Import* case the importation consisted of a standard key chain that was attached to a "Nud Nick," a small animated head resembling an imp. The appraisement of the merchandise was predicated on the basis that it constituted an entirety. In overruling the appraisement, Judge Maletz wrote the following which is pertinent to the present case:

> "* * * The independence of these components is readily apparent from a casual examination of the sample. Indeed, the key chain to which the 'Nud Nick' head is attached is by design, function and actual use a general purpose article which has obvious multiple uses in conjunction with numerous articles. See e.g., *Gene Miller, Atwood Imports, Inc.* v. *United States*, 59 Cust. Ct. 212, C.D. 3125 (1967), *dismissed and remanded on rehearing* 63 Cust. Ct. 452, C.D. 3934 (1969). Thus, the court can take judicial notice of the fact that in addition to or in conjunction with its use as a key chain, the key chain utilized with the imported 'Nud Nick' head is of a type that has been used with such diverse items as police whistles, sink stoppers, miniature flashlights, umbrellas, etc. What is more, the ease with which the key chain can be detached from the 'Nud Nick' head provides indication that the two components herein, the key chain and the head, have not lost their separate commercial identities. For it is quite apparent that should a key chain become defective, another key chain of like construction or even a piece of string could be used in lieu thereof. Similarly, the novelty nature of the 'Nud

Nick' head is not destroyed by its removal from the key chain." 67 Cust. Ct. at 449.

The same may be said in the present case. Not only are the glasses "general purpose articles," but when removed from the bars they retain their separate identity and utility. The novelty nature of the bars is not affected by removal of the glassware; nor is the independence of the book, wonder, and cask bars affected by the addition of the bar tools or the ice buckets and tongs. Furthermore, the tools, and the ice buckets and tongs are also fully independent, and may be used for their intended purpose with or without any bar.

From the foregoing, it is the determination of the court that the independence of the bars, glassware and tools (and the ice buckets and tongs of the cask bars) is fully retained, and consequently, they are not an entirety for tariff purposes.

Accordingly, plaintiff's claims that the bars are classifiable as entireties with the glassware, or with the glassware and tools, or with the glassware, ice buckets and tongs, are overruled.

Plaintiff's "sets" claim

The third question to be resolved is whether the book bars and the wonder bars, together with their glassware and bar tools, were improperly classified as "sets" within item 651.75 of the tariff schedules.

Plaintiff claims that the book and wonder bars should have been classified "as entireties, with their glassware and tools, as boxes, cases, or chests of wood under item 204.40, or, as separately dutiable articles, under the same provision, with the glassware being classified under either item 546.50 or 546.54, depending upon its value."

Item 651.75 of the tariff schedules reads as follows:

"Sets (except sets specially provided for) which include two or more of the tools, knives, forks, spoons, or other articles provided for in different rate provisions of this subpart-------	The rate of duty applicable to that article in the set subject to the highest rate of duty."

As stated previously, the book bars were imported with bar tools, consisting of a corkscrew, bottle opener, spoon and a strainer, packed together in a cardboard box which was placed in the lower drawer of the bar. The wonder bars contained a similar assortment, except that a pick was included instead of a strainer. These bar tools were the articles which the customs officials found brought the entire

importation consisting of bars, glassware, and tools, within item 651.75 of the tariff schedules, and therefore subject to the rate of duty applicable to its highest component, viz., the glassware.

Plaintiff urges that the "sets" provision embraces only sets similar to the bar tools of the present case, or sets of knives, forks and spoons. Plaintiff submits that the combination of the bar tools and glassware is a collection of dissimilar articles and, therefore, does not come within the purview of that tariff provision.

Defendant contends that, in the adoption of the "sets" provision, it was not the intention of Congress to restrict it to similar items, and urges that it also includes items that naturally complement one another in use.

In support of their respective positions, the parties call the court's attention to certain excerpts from the *Summaries of Trade and Tariff Information* (1968), Schedule 6, Volume 6, and to the case of *Tanross Supply Co., Inc.* v. *United States*, 58 CCPA 26, C.A.D. 1000, 433 F. 2d 1332 (1970).

The quotation from the "1968 Summaries," cited by the parties, at page 148 reads as follows:

> "The sets covered by this summary (TSUSA item 651.7560) are those having two or more of the tools provided for in the aforementioned subpart 3E; these sets may include items not provided for as separate articles under subpart 3E. Sets composed wholly of knives, forks, and spoons, and pedicure and manicure sets are covered in separate summaries in this volume (6:6). The following are typical of the sets covered in this summary: Barbecue sets consisting of a turner, fork, tongs, basting brush, and box; kitchen tool sets consisting of a potato masher, icing spatula, basting spoon, turner, ladle, pot fork, and rack; carpenters' sets containing a screwdriver, hammer, adjustable wrench, measuring tape, combination pliers, utility knife, and putty knife; bar sets containing an ice pick, double jigger, spoon, can and bottle opener, strainer, corkscrew, stand, and box; miniature garden tool sets consisting of a fork, spade, and cultivator; file sets; ignition wrench and plier sets; and sets of scissors. Cases, boxes, or containers of the types ordinarily sold at retail with the tools or other articles in the set are classifiable with such articles if imported therewith."

Plaintiff cites the explicit reference to "bar sets" as "typical" of the sets intended by Congress to come within the purview of the tariff provision, and emphasizes that the articles described are similar to those contained in the bar tools sets in this case.

Defendant, on the other hand, quotes the phrase: "Cases, boxes, or containers of the types ordinarily sold at retail with the tools or other articles in the set are classifiable with such articles if imported therewith." It contends that these words reveal the congressional intent

to include in the "sets" provision articles other than those enumerated in subpart 3E when they are associated in use with one another.

While the *Summaries of Trade and Tariff Information*, published by the United States Tariff Commission, are not controlling of congressional intent, they are persuasive for the purpose of resolving doubtful questions relating to the meaning and scope of tariff provisions. It is apparent from the *Summaries* that the "sets" provision of item 651.75 may include articles not provided for as separate articles in the tools, cutlery, forks and spoons provision of subpart 3E. Furthermore, contrary to plaintiff's view, the inclusion in "typical sets" of a double jigger and stand, as part of a bar set, and a measuring tape, as part of a carpenter's set, *inter alia*, is indicative of an intention to include in item 651.75 sets having dissimilar items which are usually associated in their use, and complement one another.

An examination of the wonder bars and book bars indicates that they were designed to hold glassware and bar tools. It is clear that each of these articles was intended to be used in conjunction with, and to complement one another in the storage, preparation and serving of beverages. The bars have shelves, either straight or pre-drilled, to hold both glasses and decanters. The book bar is equipped with several permanent clamps designed to hold the bar tools. In the wonder bar they may be stored in a bottom drawer. A novelty feature of the wonder bar is that it automatically opens when the bottom drawer is pulled out.

An examination of the bars, together with a study of the *Summaries of Trade and Tariff Information* and the *Tanross* case, lead to the conclusion that the merchandise was properly dutiable as classified by the customs officials.

The merchandise in the *Tanross* case was described as "#1000 Educational Kits and #1553 Microscope Dissecting Kits." While both "kits" were classified under item 651.75, they presented different questions, and were separately discussed by the appeals court. In the present case both parties rely upon that portion of the appellate decision which dealt with the "#1000 Educational Kits."

The "Educational Kits" consisted of laboratory beakers, test tubes, chemicals, a plastic-handled knife, a needle probe, a dissecting board, an instruction book, and other items used in the preparation of specimens for viewing under a microscope, but did not contain a microscope. The collector found that the plastic-handled knife and the needle probe brought the entire kit under the duty rate provision applicable to the plastic-handled knife.

There were two questions to be resolved. First, were the entire kits "sets" within the meaning of item 651.75, or were the plastic-

handled knife and the needle probe, themselves, "sets." Second, should imported articles be classified as "sets" under this tariff item when the unit by which the goods are imported and sold, both at wholesale and retail, contains two or more of the articles enumerated in different rate provisions in subpart 3E, but also contains many other articles not provided for in that subpart.

In affirming the holding of this court, that the "#1000 Educational Kits" were "sets" within the meaning of the tariff item, the Court of Custom and Patent Appeals enunciated a test or standard which is applicable here. The court said:

> "As the court below noted, 'Item 651.75 of the Tariff Schedules of the United States with which we are here concerned projects a new concept in the assessment of import duties.' The word 'sets' as used therein certainly is not, as Tanross would have us hold, simply a synonym for 'entireties,' but it is not easy to say just what Congress did mean when it used the word. There is very little legislative history to guide us in interpreting this new provision, but what there is in no way suggests that the word 'set' should be given, in this context, any meaning other than its usual meaning of 'A number of things of the same kind ordinarily used together; a collection of articles which naturally complement each other, and usually go together; an assortment; a suit; as, a *set* of chairs, of china, of books, of teeth, etc.' Webster's New International Dictionary (2d ed. 1956). Since the #1000 Educational Kits are *'a collection of articles which naturally complement each other, and usually go together,'* all being items used in connection with the preparation of specimens for viewing under a microscope and not being simply an aggregation of disparate articles imported together for shipping convenience, we agree with the court below that they are 'sets' within the meaning of TSUS Item 651.75." (Emphasis added in part.) 58 CCPA at 30–31.

The two bars, together with their glassware and bar tools, to borrow the words of the appellate court, are not "simply an aggregation of disparate articles imported together for shipping convenience." 58 CCPA at 31. They are clearly "a collection of articles which naturally complement each other, and usually go together." *Id.* at 30–31. The bars, glassware and bar tools comprise a multifunctional unit for the decorative display of articles used to store, prepare and serve beverages. Indeed, plaintiff's illustrative catalogs depict all of the articles as being offered for sale together.

This determination is also in accord with the holding in the case of *United States* v. *Mark Cross Co.*, 4 Ct. Cust. Appls. 274, T.D. 33489 (1913). In the *Mark Cross* case the question pertained to the meaning of the term "set" as used in paragraph 452 of the Tariff Act of 1909. The merchandise consisted of certain leather cases, boxes and bags

fitted with toilet or other articles, designed for one's personal use and convenience. The court held that any combination of toilet articles, in cases and boxes, came within the definition of "traveling set" provided they were made up to be carried by the traveler, and were designed for the toilet or care of his person or clothing while traveling.

These authorities lead to the conclusion that the book bar and wonder bar, together with their glassware and bar tools, were properly classified under item 651.75 of the tariff schedules. Since plaintiff has not borne its burden of proof that they were incorrectly classified, its claim is overruled.

As a consequence of this determination an importer is made to pay the higher rate of duty for importing articles in a set, which, if imported separately, would bear a lower duty. Although this may seem inequitable and anomalous, it is clearly a policy determination within the exclusive province of the Congress. See *Authentic Furniture Products, Inc.* v. *United States*, 68 Cust. Ct. 204, 210, C.D. 4362, 343 F. Supp. 1372, 1377, *aff'd*, 61 CCPA 5, C.A.D. 1109, 486 F. 2d 1062 (1973), and cases cited therein. That the question was considered, and the result reflects the policy judgment of the legislature, may be gleaned from the following explanation found in the *Explanatory and Background Materials, Tariff Classification Study*, Schedule 6 (1960) (at page 200):

> "Item 651.75 is a new provision covering sets which is not derived from any specific provisions of the current tariff act. It is designed primarily to facilitate customs administration. Many articles of types provided for in this subpart are bought and sold as sets, and this proposed provision acknowledges this fact and provides realistically therefor. Although this provision would apply to the entire set the highest rate applicable to any article in the set, this would not impose undue hardship on importers inasmuch as they could always import the various articles and obtain the regular rates if they deferred the packaging of them as sets until after importation. It is significant to note that the proposed provision corresponds with a standard provision of the Brussels Nomenclature."

In areas of unquestioned constitutional authority, the judicial function to interpret and apply statutes does not include the power to judge their wisdom, or the legislative policy that prompted their enactment.

In view of the foregoing, it is the determination of the court that the plaintiff has not rebutted the statutory presumption of correctness, and has failed to establish that:

1. the wine racks, the keg bars, the castle bars, the tavern bars, the executive roll top desk bars and the bookshelf bars are "furniture," within the meaning of that term as used in the tariff schedules;

2. the bars are dutiable as entireties with the glassware, or with the glassware and tools, or with the glassware, ice buckets and tongs, with which they were imported; and that

3. the book bars and wonder bars were improperly classified as "sets" together with their glassware and tools.

Plaintiff's claims are overruled, and the classifications of the customs officials are sustained.

Judgment will issue accordingly.

(C.D. 4682)

MICROPOINT, INC. *v.* UNITED STATES

Court No. 75-10-02567

Port of San Francisco

[Defendant's motion to dismiss granted.]

(Dated December 27, 1976)

Ian G. Allen for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

Memorandum Opinion and Order

WATSON, Judge: Plaintiff filed a protest against the classification of two entries of its merchandise, which protest was eventually approved by the Customs Service. In the approximately two-year interim before it was approved, evidently acting under the impression the first protest was sufficient to protect its rights regarding later entries of the same merchandise, plaintiff did not protest their classification within 90 days of their liquidation. Then, after the success of its first protest and more than 90 days after liquidation, plaintiff filed protests against the classification of the "interim" entries, following which the protests were denied as untimely.

Defendant now moves to dismiss for lack of jurisdiction the civil action brought to contest the denial of these protests. Defendant relies on the untimeliness of the protests. Plaintiff asserts its initial protest was sufficient to preserve its rights with regard to all its later importations and further argues that the relevant language of section 514 of the Tariff Act of 1930 (19 U.S.C. § 1514) is so vague and ambiguous it does not adequately inform the plaintiff of what must be done to protect its rights and therefore deprives it of due process of law in violation of the fifth amendment of the United States Constitution.

In 19 U.S.C. § 1514,* the statute, in relevant part, speaks of "decisions" of the appropriate customs officer; first that the decisions shall be final unless protested and then that a protest shall set forth distinctly and specifically each decision to which it is addressed. Included in the variety of decisions which become final unless protested are the classification of the merchandise and the liquidation of an entry. I think it is reasonably clear the "decisions" of which the statute speaks are acts which relate to specific existing entries of merchandise. While it may be within the realm of possibility for an importer to gain the impression the first decision is the only decision of importance, I don't think a fair and reasonably careful reading of the statute will support that impression. Unconstitutional vagueness exists when those whose conduct is affected by the statute can only guess at what it means not merely when the statute is the subject of an occasional misinterpretation.

The occurrence of such a mistake may point to the need for greater precision or superior clarity of expression but it does not, standing alone, point to a vagueness repugnant to the due process clause of the fifth amendment. The Constitution does not require perfection of expression, which is a rare accomplishment indeed, but only a degree of expression sufficient to communicate adequately when measured by common understanding and practices. *Association of American Physicians and Surgeons* v. *Weinberger*, 395 F. Supp. 125, 138 (N.D. Ill. 1975). See generally, *United States* v. *Petrillo*, 332 U.S. 1, 5–8 (1947).

As the statute stands I believe it is, if not pellucid, at least clear that the decisions of which it speaks are those the appropriate customs officer makes with respect to pre-existing entries and are final as against everyone, including the government, unless a protest is filed within 90 days of liquidation of the entry to which the decision relates. It is further clear that a protest must relate to and specify the decisions at issue as they are embodied in a liquidated entry. Neither the deci-

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*The relevant portion of the statute reads as follows:

(a) * * * [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

* * * * * * * *

(2) the classification and rate and amount of duties chargeable;

* * * * * * * *

(5) the liquidation or reliquidation of an entry, or any modification thereof;

* * * * * * * *

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court in accordance with section 2632 of Title 28 within the time prescribed by section 2631 of that title. * * *

(b) * * *. (1) A protest of a decision under subsection (a) of this section shall be filed in writing with the appropriate customs officer designated in regulations prescribed by the Secretary, setting forth distinctly and specifically each decision described in subsection (a) of this section as to which protest is made; each category of merchandise affected by each such decision as to which protest is made; and the nature of each objection and reasons therefor. * * *

sions nor the protests have any effect beyond the existing entries to which they refer. In a legal as well as practical sense each entry is a separate event and I think this is understandable from the language of the statute.

Since the single timely protest which plaintiff filed related only to the entries referred to therein and had no prospective effect on later entries and since the protests at issue herein were ultimately filed beyond the time limit allowed by the statute, defendant's motion to dismiss for lack of jurisdiction must be granted.

It is therefore,

ORDERED, ADJUDGED AND DECREED that this action be dismissed for lack of jurisdiction.

(C.D. 4683)

MICROPOINT, INC. *v.* UNITED STATES

Court No. 76-3-00752

Port of San Francisco

[Defendant's motion to dismiss granted.]

(Dated December 27, 1976)

Ian G. Allen for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

Memorandum Opinion and Order

WATSON, Judge: The disputed protests encompassed in this action were filed after the period allowed for their filing by 19 U.S.C. § 1514 (b)(2)(A). Thus one of the prerequisites for the exercise of jurisdiction by this court is lacking and they must be dismissed.

In addition, insofar as protest No. 2809-5-000886 protests entry Nos. 104642 and 106919, it is concededly moot. Insofar as protest No. 2809-5-000887 relates to entry No. 140371 in advance of its liquidation, it is premature and must be dismissed.

The memorandum opinion and order in Court No. 75-10-02567, 77 Cust Ct 133, C.D. 4682, discusses more fully the reasons for rejecting plaintiff's argument that the statute allows an initial protest to preserve the importer's rights with respect to later entries of the same merchandise or is otherwise so vague as to deprive the importer of due process of law.

For the above reasons, it is

ORDERED, ADJUDGED AND DECREED, that this action be dismissed for lack of jurisdiction.

(C.D. 4684)

RENE D. LYON CO., INC., v. UNITED STATES

Court Nos. 66/16734, etc.

Port of New York

[Defendant's motion to dismiss granted.]
[Plaintiff's cross-motion for summary judgment denied.]

(Dated December 28, 1976)

Serko & Simon (*Joel K. Simon* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Mark K. Neville, Jr.*, trial attorney), for the defendant.

Memorandum Opinion and Order

WATSON, Judge: Defendant has moved to dismiss these cases for lack of prosecution, pointing to the lack of activity since joinder of issue, which generally took place in March, September and October of 1973. Defendant's motion to amend the schedule of cases to include 70/60442 is granted.

In opposition plaintiff points to its filing of notices of consent to substitution of attorney in January and February of 1976 and to its submission of proposed stipulations to defendant (which followed the making of this motion but which plaintiff asserts was contemplated from the time of filing the notices of substitution). In addition plaintiff attributes its delay to the overflow of cases from the famous October 1970 reserve file and to a period of limited operations due to the dissolution of the partnership of Serko & Sklaroff. Plaintiff also filed a cross-motion for summary judgment.

I consider the period in which these cases were permitted to remain inactive to be beyond that which can be tolerated and a definite sign the actions were not being prosecuted with due diligence within the meaning of rule 8.3(b)(4) of the rules of this court. *Englishtown Corp.* v. *United States*, 73 Cust. Ct. 240, C.R.D. 74–12 (1974). *Cf. Novelty Import Co.* v. *United States*, 72 Cust. Ct. 186, C.D. 4539 (1974).

Although the ultimate filing of the consents to substitution of attorney was a necessary prelude to further prosecution of the case, it was not in itself a particularly redeeming or affirmative act after the two to almost three year periods of inactivity in these cases. This is so whether or not the government's motion was prompted by the filing of the consents to substitution, whether or not the substitutions were indeed the first phase of a unitary plan to prepare and offer stipulations and whether or not plaintiff had a strong case on the merits.

The activity simply came too late to be the exercise of due diligence, a conclusion which is reinforced by the fact the notices of substitution filed in early 1976 were authorized back in October of 1974.

The existence of an excess of work from the October 1970 reserve file and the limitations of activity flowing from the dissolution of a law firm have little appeal to me as excuses for the periods of inactivity involved herein.

Since these are proper circumstances for dismissal for lack of prosecution plaintiff's motion for summary judgment is denied.

It is therefore,

ORDERED, ADJUDGED AND DECREED that the cases listed on the attached schedule are dismissed for lack of prosecution.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Reappraisements

(R.D. 11778)

ROSS GLOVE COMPANY *v.* UNITED STATES

Leather gloves

PHILIPPINE ARTICLES—VALUE OF FOREIGN MATERIALS—LACK OF PROBATIVE EVIDENCE

Men's leather gloves manufactured in the Philippine Islands with rabbit fur linings of Belgian origin and exported to the United States, *Held*, not to be advisorily classifiable as "Philippine articles" where the sole evidence of value offered in accordance with applicable Philippine export value is derived from a "purchaser" of the linings in Belgium not shown to be a competent witness of the Belgian manufacturers' sales policies and practices, and the underlying contract of the "purchaser" does not provide for exportation of the merchandise to the Philippine Islands, but contemplates delivery in Belgium.

Reappraisement No. R68/11664

Entered at Milwaukee, Wis.
Entry No. 1499–S.

(Decided on remand [A.R.D. 318] August 17, 1976)

Mayer, Brown & Platt (*Walter Treumann* and *J. Stanley Stroud* of counsel); *Barnes, Richardson & Colburn* (*Joseph Schwartz* and *Earl R. Lidstrom* of counsel), associate counsel; for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Brian S. Goldstein* and *Patrick D. Gill*, trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise in this appeal for reappraisement consists of 624 dozen pairs of fur-lined leather gloves which were exported from the Philippine Islands on August 31, 1962, and appraised upon entry at Milwaukee, Wisconsin, at U.S. $25.77 per dozen pairs, net, packed, on the basis of constructed value as defined

in 19 U.S.C.A., section 1401a(d) (section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956). The plaintiff-importer does not challenge the basis of value or the return of value made in the appraisement. Plaintiff contends that the value of the foreign materials used in the manufacture of the gloves in the Philippine Islands did not exceed 20 percent of the U.S. appraised value of the gloves, and as such, the gloves should have been advisorily classified by the appraiser as "Philippine articles" so as to be eligible [upon liquidation] for the reduced rate of duty accorded "Philippine articles" under the provisions of the Philippine Trade Agreement of 1946 as revised pursuant to the Philippine Trade Agreement Revision Act of 1955 (69 Stat. 413), which, in this case, amounts to 20 percent of the ordinary customs duty assessed on Philippine articles.

The Government disputes plaintiff's contention, and under the law of the case, the court is required in this proceeding to determine if plaintiff has established the value of the foreign materials in the gloves in accordance with the customs laws of the Philippines. See *Ross Glove Company* v. *United States*, 71 Cust. Ct. 219, A.R.D. 318, 363 F. Supp. 1395 (1973), reversing and remanding *Ross Glove Company* v. *United States*, 68 Cust. Ct. 236, R.D. 11763, 337 F. Supp. 907 (1972).

The applicable customs laws of the Republic of the Philippines were introduced into the record through the testimony of Jesus B. Bito, a Philippine Lawyer who specializes in customs and tax cases in that country. The text of these laws is contained in section 201 of the Tariff and Customs Code of the Philippines (Republic Act No. 1937) which reads:

> Sec. 201. *Basis of Dutiable Value.*–Whenever an imported article is subject to an *ad valorem* rate of duty, the duty shall be assessed upon the market value or price at which, at the time of exportation, the same, like or similar article is freely offered for sale in the principal markets of the exporting country for exportation to the Philippines, in the usual wholesale quantities and in the ordinary course of trade (excluding internal excise taxes to be remitted or rebated), plus ordinary expenses prior and incidental to the lading of such article on board the vessel or aircraft at the port of export (including taxes or duties, if any) and freight paid as well as insurance premium paid covering the transportation of such article to the port of entry in the Philippines.
>
> When the value of the article cannot be ascertained in accordance with the preceding paragraph, the value shall be the domestic wholesale market value or selling price of the same, like or similar imported article in the principal market of the Philippines on the date of exportation of the article under appraisement, in the usual wholesale quantities and in the ordinary course of trade, minus the import duty and other taxes as well as a

commission not exceeding six *per centum* if any has been paid or contracted to be paid on goods secured otherwise than by purchase, and profits not to exceed eight *per centum* and a reasonable allowance for general expenses not to exceed eight *per centum* on purchased goods, and all other expenses incidental to the delivery from the port of importation to the principal market in the Philippines.

As this statue indicates, dutiable value in the Philippines is predicated primarily upon an *export value*, and alternatively, upon *domestic market value*. In this case plaintiff apparently relies upon the export value provision, having introduced no evidence directed toward the establishment of a domestic market value.

On the matter of Philippine export value Carl Ross, plaintiff's president and a stockholder, testified that he is in charge of plaintiff's sales, its major purchasing and also handles the importation of gloves. He stated that he is familiar with the 624 dozen pairs of fur-lined gloves covered by the invoice at bar, having seen them at the time of their arrival at plaintiff's factory in Sheboygan, Wisconsin. He testified that the only material in the imported gloves that came from a country other than the Philippines or the United States is the cut rabbitskin lining and that the linings were imported into the Philippines under customs bond from Belgium by Carla Trading Corporation, Ltd. a Bahamian corporation in which he is a stockholder and an officer, and there sold to plaintiff who caused the linings to be processed into the imported gloves by Ross Glove Manufacturing, a Philippine division of Carla Trading Corporation, Ltd. consisting of a team of laborers assembled in the Philippines for that purpose by the parent corporation.

The 624 dozen pairs of linings involved in the imported gloves in issue are said by the witness Ross to be part of a shipment of 1,016 dozen pairs of linings shown by documentation in the record as going from Antwerp, Belgium in April, 1962 and arriving in Manila, Philippine Islands in June, 1962 (Import Entry – collective exhibit 3), and leaving the Philippine Islands in three exporting vessels between August 20 and September 15, 1962 (Application for Bond Cancellation – exhibit 2). His testimony in this regard is based upon records given to him by the manager of Ross Glove Manufacturing and certified by the customs storekeeper in the Philippines.

Mr. Ross testified that the 1,016 dozen pairs of linings were purchased by Carla Trading Corp. acting through plaintiff, under contract dated January 22, 1962 with Peausserie de Destelbergen, a Belgian company located near Ghent, Belgium, covering 4,564 dozen pairs of precut rabbitskin linings at a price of U.S. $4.82 per dozen pairs f.o.b. Antwerp, plus packing of U.S. $30 per delivery. The contract received in evidence as exhibit 5 reads in part:

3) The 4,564 dozen shall be delivered in six monthly deliveries, namely five deliveries of 600 dozen men's and 144 dozen children's; the sixth delivery of 700 dozen men's and 144 dozen children's, subject to unforeseen contingencies or acts of God. The first shipment is intended for March 1962.

4) The invoices shall be drawn up and sent to the name of CARLA TRADING CORPORATION, Nassau, Bahamas. Copy will be sent to the Ross Glove Company. The merchandise will be turned over to the forwarder, the firm of J. P. Best & Co. of Antwerp, at the disposition of Ross Glove Company, Sheboygan.

Mr. Ross also identified other documents connected with this transaction, namely, a bill of lading, dated April 17, 1962, and signed by the forwarder John P. Best & Co. of Antwerp, Belgium, covering 10 bales of rabbitskins, to which is attached a packing slip and an invoice from Destelbergen (collective exhibit 4), and a freight bill for 10 bales of rabbitskins from the forwarder John P. Best & Co. to plaintiff stamped paid under date of May 10, 1962 (exhibit 6). On the documents generated by the forwarder, namely, the bill of lading and the freight bill, the destination MANILA by way of M/S CEYLON appears.

The witness also testified that on the basis of experience he acquired in his travels to and dealings in Belgium that the market for this merchandise was centered in and around Ghent, Belgium and that it evolved around three suppliers of precut rabbitskin linings of the same quality, namely, Destelbergen and Scaldis of Ghent, and Ed. Block of Merelbeke which is near Ghent. According to the witness, plaintiff has done business with the Block establishment involving the shipment of precut rabbitskin linings in March and April of 1962 from Belgium to Manila in the same format as characterized its dealings with Destelbergen. Mr. Ross stated that all costs to make the shipment and deliver it to Antwerp, Belgium were included in the purchase price except the packing which was extra, and that on the basis of his experience in buying linings from Belgium, the purchase price did not depend upon quantity, and that the purchases were made in the ordinary course of trade and were not unusual transactions between companies which were not related to the suppliers.

Rudolph Frenville, a partner in the firm of M. Frenville & Co., New York importers of pickled skins and fur linings, testified that his firm has purchased precut fur linings from Scaldis and Block and that he has heard of Destelbergen but has not done business with that company. He stated that in February of 1962, his firm purchased 3,000 dozen pairs of precut men's fur linings from Scaldis at a price of $4.80 f.o.b. Antwerp, plus packing under an exclusive arrangement with the supplier to buy its entire output and these linings were resold by Frenville to plaintiff for shipment to Manila at the price of $5.30, c.i.f. Manila.

Mr. Bito testified that under the Philippine export value statute the Scaldis price for precut linings ($4.84) is ruled out as a basis for finding export value because a Philippine importer could not purchase this merchandise by reason of the exclusive arrangement involving a U.S. customer. The witness stated, "We also have to consider that the merchandise should be freely offered for sale in the usual wholesale quantities and in the ordinary course of trade." (R. 224) Mr. Bito was of the opinion that an export value under the statute could be based upon the Destelbergen price of $4.86 plus actual freight and insurance, if any, because it puts all Philippine importers on an equal level at one uniform dutiable value for the same, like or similar article. His opinion was based upon the assumption of fact, among others, that Destelbergen *contracted* in Belgium *with plaintiff to sell* it 4,564 dozen pairs of precut rabbitskin linings *for exportation to the Philippines* at that price inclusive of packing charges. (R. 218)

Plaintiff, relying on its Destelbergen transactions, contends that the record establishes that the value of the foreign materials in the gloves, as ascertained in accordance with Philippine law, did not exceed 20% of the appraised value of the imported gloves. Plaintiff argues, "This evidence provides ample basis for Mr. Bito's expert opinion that the Destelbergen price of $4.86 per dozen pairs ($4.82 plus 4¢ packing) was the applicable market value or price for the linings in the gloves in question under then-effective Philippine customs law . . ." (plaintiff's brief, page 38). Defendant contends that plaintiff has failed to prove its claim of export value under Philippine law. Defendant argues, "We submit that plaintiff has utterly failed to offer any probative or convincing proof as to what the value of the fur linings would have been as ascertained under the customs laws of the Philippines." (defendant's brief, page 13)

The court agrees with defendant in this case. In the light of testimony elicited from the witness Bito which reveals the Philippine export value law to be not unlike our own export value statutes in some important aspects, i.e., freely offered price, usual wholesale quantities, ordinary course of trade, it is clear to the court that the evidence presented by plaintiff lacks probative force in establishing that the Belgian fur-lining manufacturer's (Destelbergen) price conformed to the requirements of Philippine export law. Putting aside the confusion fostered by this record as to the identity of the contracting party doing business with Destelbergen, the only evidence in the record relating to value other than the testimony of the expert witness, is derived entirely from persons occupying the status of *purchasers* of rabbit fur linings. And there is nothing in the record which demonstrates the competency of these *purchasers* to authoritatively speak about the seller-manufacturer's sales policies and practices which a

court would need to know in order to properly apply Philippine export value law to the evidence in the case.

Some statement from the seller itself on the subject is a must. And a purchaser does not normally possess this knowledge. *Cf. B & W Wholesale Co., Inc.* v. *United States*, 63 Cust. Ct. 691, A.R.D. 262 (1969), affirmed, 58 CCPA 92, C.A.D. 1010, 436 F. 2d 1399 (1971); *Samuel S. Perry* v. *United States*, 21 Cust. Ct. 286, Reap. Dec. 7614 (1948).

In A.R.D. 262 the appellate term of this court, in a similar context involving a statement under oath of an alleged buying agent to the effect that the manufacturers of various imported articles had offered and sold their goods to anyone who wished to buy at ex-godown prices, rejected such evidence, stating (p. 698), "affiant Matsumoto did not establish in the affidavit his competency to know what the manufacturers' sales practices were at the time of exportation here involved. He is not shown to be connected with any of the manufacturing concerns in any way, and his relationship to them as an alleged buying agent only commenced in the same year of which he speaks in the affidavit, namely, 1961. From such poor vantage point Matsumoto is not, in our opinion, in a position to speak authoritatively on the subject of the manufacturers' sales practices in the country of exportation on the broad spectrum necessary in a reappraisement case."

In R.D. 7614 the reappraising judge rejected the testimony of the importer to the effect that there was a free open market price to anyone who wanted to buy whether for export or for home consumption, based upon his visits to the manufacturers. The court stated (p. 288), "It has been held that a statement of a *manufacturer* that he is willing to sell to anyone at the price charged the importer is no proof of market value in the absence of evidence of sales or offers to sell at the prices noted on the invoices. [Citations omitted.] A similar unsupported statement by an *importer* is likewise insufficient proof of market value."

In the instant case the witness Ross admitted on cross-examination that he did not know who else Destelbergen or Block sold to during this period. (R. 150) Consequently, it is inconceivable to the court that he could know what offers Destelbergen made to others and at what prices, terms and conditions and in what quantities.

Moreover, although the Destelbergen contract is heralded by the witness Ross and his counsel as providing for monthly shipments starting in March of 1962 "from Belgium to Manila, Philippines" (R. 54), this posture is not borne out by the document itself (exhibit 5). As counsel for the Government aptly observed at the trial with respect to the Destelbergen course of conduct (R. 85) there is nothing in its documentation of the transaction with plaintiff to indicate that

the transaction was for exportation to the Philippines. The contract in issue (exhibit 5) goes no further than to determine a price f.o.b. Antwerp and to provide for delivery of the merchandise to plantiff's forwarding agent in Belgium. Thus, destination of the merchandise was not a factor in the contractual negotiations consummated between Destelbergen and plaintiff. Destination of this merchandise clearly appears only to have been worked out between plaintiff and its forwarding agent Best, being bought and paid for separately by plaintiff and wholly apart from its dealings with Destelbergen. Consequently, there is no evidence in the Record that Destelbergen offered to sell the fur linings in issue for exportation to the Philippines, or for that matter, was disposed toward selling this merchandise to Philippine purchasers or importers—a necessary circumstance upon which the opinion of the witness Bito was premised.

It follows, therefore, that plaintiff has failed to prove the value of the linings in the imported gloves in accordance with applicable Philippine export value law and that the appraiser erred in not advisorily classifying the gloves as "Philippine articles". On this record the court finds as facts:

1. That the merchandise in issue consists of 624 dozen pairs of fur-lined men's leather gloves which were manufactured in the Philippines with fur linings which were not of Philippine or United States origin, and exported therefrom to the United States on or about August 31, 1962.

2. That said merchandise was appraised upon entry at the port of Milwaukee, Wisconsin, at $25.77 per dozen pairs, net, packed, on the basis of constructed value as defined in 19 U.S.C.A., section 1401a(d) (section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956).

3. That there is no probative evidence in the record of the value of the fur linings in said gloves in accordance with the customs laws of the Republic of the Philippines and as of the time of their importation into the Philippine Islands.

On these facts the court concludes as matters of law:

1. That the plaintiff has failed to rebut the presumption of correctness attaching to the appraised values.

2. That constructed value as defined in 19 U.S.C.A., section 1401a(d) (section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) is the proper basis for determination of the value of the merchandise herein.

3. That such constructed value is the appraised value herein.

Judgment will be entered herein accordingly.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 76–5)

SYMPHONIC ELECTRONICS CORP. *v.* UNITED STATES

Cross-motions for summary judgment

Court No. 74–4–00896

Port of Boston

[Cross-motions denied.]

(Decided July 7, 1976)

Barnes, Richardson & Colburn (*Richard C. King* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney), for the defendant.

MEMORANDUM OPINION AND ORDER

NEWMAN, Judge: The parties in this civil action have filed cross-motions for summary judgment pursuant to rule 8.2. For the reasons stated herein, the cross-motions are denied.

The issue involves the proper tariff classification of plaintiff's Model R860 AM/FM/MPX stereo "chassis", which was imported from Japan in 1972. The district director at the port of Boston assessed duty on the merchandise at the rate of 10.4 per centum ad valorem under the provision in item 685.23, TSUS, as modified by T.D. 68–9, for "Solid-state (tubeless) radio receivers". Plaintiff claims that the imports are properly dutiable at the rate of 6 per centum ad valorem under the provision in item 685.25, TSUS, as modified by T.D. 68–9, for "Other" radiobroadcasting and reception apparatus, and parts thereof.

The imported "chassis" is concededly a "solid-state (tubeless)" device, and the sole question for determination is whether the imports are "radio receivers".

There is no dispute that the Model R860 chassis is the same in all material respects as the "R835 AM/FM tuners", the subject of

Symphonic Electronics Corp. v. *United States*, 72 Cust. Ct. 211, C.D. 4543 (1974), wherein I sustained the Government's assessment of duty on the articles pursuant to item 685.23.

The Model R835 in the prior *Symphonic* case comprised a tuner-amplifier,[1] which possessed the basic components and circuitry necessary for the reception of AM, FM and FM stereo multiplex (MPX) signals, and also possessed sufficient amplifying capability to operate loudspeakers. In its condition as imported, the Model R835 had no cabinet, loudspeaker, control knobs or calibrated station dial, and was designed and intended for incorporation into combination radio-phonographs.

In support of its motion for summary judgment, plaintiff has submitted an affidavit of Kenneth L. Freeland, who testified on plaintiff's behalf in the prior *Symphonic* case. Defendant, in support of its cross-motion, has incorporated the record of the prior case, which includes the testimony of three witnesses called on its behalf.

In the prior *Symphonic* case, for purposes of comparison, I cited: "*Cf. Montgomery Ward & Co., Inc.* v. *United States*, 70 Cust. Ct. 193, C.D. 4430, 362 F. Supp. 560 (1973) (*appeal pending*)". There, the importation comprised four components or subassemblies of an electronic organ, which after importation were assembled together with a cabinet, hardware and loudspeaker into plaintiff's "electronic organ", Model 8931. The issue was whether the imported components, standing alone, constituted an electronic musical instrument (an organ) within the purview of item 725.47, TSUS, or parts of a musical instrument under item 726.80. The Customs Court held that the cabinet, hardware and loudspeaker were not essential components of an electronic organ, and sustained the Government's classification under item 725.47.

Subsequent to the prior *Symphonic* decision, the appellate court reversed the judgment in *Montgomery Ward* (61 CCPA 101, C.A.D. 1131, 499 F. 2d 1283 (1974)), finding that the cabinet and loudspeaker were basic parts of an electronic organ, and that therefore the imported components when assembled did not constitute an "electronic organ" within the common meaning of that term. Accordingly, the appellate court held that the Government's classification of the components as an electronic musical instrument under item 725.47 was erroneous.

In arriving at its decision in *Montgomery Ward*, the appellate court observed, *inter alia*, that a cabinet and speaker are basic elements of an organ; that the imported components when assembled were unable to generate an audible musical sound without a loudspeaker; that it

[1] Accompanying the R835 tuners were an equal number of power transformers used with the tuners.

was essential to classification as a "musical instrument" there be a capability in an organ of producing sound when played upon; that there was no significant evidence in the record that organs of the type in which the importations were used were ever sold without cabinets; and that a cabinet was essential to the conventional use of an electronic organ.

In essence, plaintiff's position is that my prior decision in *Symphonic* requires a reexamination in light of the subsequent holding of the appellate court in *Montgomery Ward* that a speaker and cabinet are essential components of an electronic organ.

Defendant argues that *Montgomery Ward* is distinguishable from the facts disclosed by the incorporated record, and that the prior *Symphonic* case is *stare decisis* inasmuch as there has been no clear and convincing showing of error.

While a cabinet and loudspeaker are essential components of an *electronic organ* (*Montgomery Ward*), the issue in the instant case is whether such components are essential to a *radio receiver* within the common meaning of that term. Reflecting the common meaning of the term "receiver" (as distinguished from "receiving set") is the following definition:

> 86 C.J.S. *Tel. & Tel., Radio & Television* § 293 (1954):
>
> *"Receiver;" "receiving set."* A "receiver" is commonly understood in the trade as including something more than a tuned radio frequency receiver; *it takes in what is called a chassis; in other words, a chassis plus tubes is a receiver in the trade sense of the word.* In that sense, the combination of the essential elements of a radio receiver, arranged and mounted, for commercial purposes, on a frame, called a "chassis", constitutes a receiver. [Footnote references omitted; emphasis added.]
>
> A "receiving set" comprises a receiver and some form of telephonic device; it may be said with some approach to accuracy that a receiving set consists of a receiver and a loud speaker. [Footnote references omitted.]

Additionally, *Encyclopaedia Britannica*, 1970 ed., Vol. 11, pp. 485–486, states:

> A "tuner" is employed for reception of radio broadcasts. The hi-fi tuner is simply a refined version of a radio receiver, but without audio amplifier or loudspeaker.
>
> * * * * * * * * * * * [W]*hen a radio tuner is combined with an integrated amplifier, the resulting unit is referred to as a "receiver"*. [Emphasis added.]

Significantly, too, the imported R860 stereo unit was described on the invoice as a "chassis". At 86 C.J.S. § 293, the term "chassis" with reference to radio receivers is defined as follows (at 302):

> *"Chassis."* A "chassis" is a metal structure on which the tuned radio frequency receiver *complete in all its elements, except its*

tubes, is mounted; it is the frame on which the essential elements of a radio receiver are, for commercial purposes, arranged and mounted. *The use of the word "chassis" connotes a radio receiver.* [Footnote references omitted; emphasis added.]

In *Radio Corporation of America* v. *Philadelphia Storage Battery Co.*, 23 Del. Ch. 289, 6 A. 2d 329 (1939), the Supreme Court of Delaware had occasion to consider the scope of the term "radio receiver", and whether a speaker and cabinet were essential components thereof, in determining the base on which royalties were to be computed under a license agreement granted by Radio Corporation of America. In this context, the court observed (at 333):

* * * A radio receiver is a device comprising apparatus that converts radio waves into sound waves of the same character as those emitted from the speech or music broadcast. The apparatus, when electrically energized, receives from the antenna radio frequency signals and transforms them into audio frequency signals. Thermionic valves or tubes are necessary. Electric power from dry cells, storage battery or generating plant is required; and where the alternating current from a generating plant is the source of electrical energy, a device known as a battery eliminator is made necessary in order to change the alternating current to a direct current. *The devices and contrivances, coils, electrical circuits and tubes, designed to receive, select and amplify sound, comprising the essential elements of a radio receiver, are, for commercial purposes, arranged and mounted on a frame, called a chassis, and the combination of the essential elements so mounted constitutes a receiver in the trade sense of the word. The use of the word "chassis" connotes a radio receiver.*

To reproduce the audio frequency signals so that they may be heard, some form of telephonic appliance is necessary. In the early days of the art, a head set was generally used. This device was followed by what is known as a loud speaker. There were, and are, loud speakers of many kinds and varying degrees of excellence. *While essential for the reproduction of sound to the ear in the absence of a telephone head set, a loud speaker is no part of the receiver.* A receiving set comprises a receiver and some form of telephonic device; and as the loud speaker is generally employed, it may be said with some approach to accuracy that a receiving set consists of a receiver and loud speaker.

The case or cabinet in which the receiver is housed is not a necessary component of a receiving set, although the cabinet may be so constructed as to improve the sound. A complete radio receiving set ready for immediate use by the purchasing public may be defined to be a combination of receiver, loud speaker, batteries or battery eliminator, tubes and other devices necessary or useful for satisfactory audible reception, including a cabinet in which the combination is installed. [Emphasis added.]

In addition to the foregoing legal and encyclopedic authorities, I have considered the testimony in the incorporated record, which is

relied upon by both parties.[2] Pertinent to the issue here of the essential components of a "radio receiver", as that term is used in the electronics industry, is the following testimony of Mr. Freeland on cross-examination (R. 69–71, 86–87):

Q. * * * If you have a product that has a tuner and also a power amplifier, would that, in your definition, be a radio receiver?—A. If it had a tuner and a power amplifier, it would be a radio receiver, with the addition of speakers, yes.

Q. Now, in your knowledge of the trade today, I assume that you feel that speakers are essential before you have something that's called a receiver?—A. *Not necessarily.* I feel that a receiver would consist of a tuning device, an amplifying device, and a power transformer or suitable energy to power the unit.

Q. Now, the R 835, do we have the tuner element in that particular item?—A. Yes, we do.

Q. And do we also have a power amplifier in that item?—A. Yes we do.

Q. Now, assuming, Mr. Freeland, that I had a transformer, a power transformer on that unit, and I wanted to operate the AM section, what would I need in addition to the transformer to make it do that?—A. You would need, in order to interpret it to your ears, you would need a speaker.

Q. And that is all?—A. And a suitable, of course, house current, voltage.

Q. And is the same true with FM?—A. The same is true of the functions of this, which is AM and FM.

* * * * * * *

Q. Now, we take that R 835, which is Plaintiff's Exhibit No. 1. Let's assume that we have a power transformer with it. Is that not a tubeless radio receiver?

* * * * * * *

A. As I would define a receiver, as it's known in the trade, it would have a case, a power transformer added to it, suitable knobs and a dial mechanism in order for the customer to be able to know what frequency and what station he was selecting. This way he has no knowledge.

Q. Where did [sic] those additions, that would be a receiver?—A. As it's commonly thought of, yes.

And on redirect examination, Mr. Freeland testified (R. 87–88):

Q. You have been asked a number of times whether the imported article would be a receiver if you had added a power amplifier. Will you explain whether any other wiring or other parts had to be added to the article before it would be a receiver,

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[2] Mr. Freeland's testimony in the incorporated record is, in effect, incorporated in his affidavit by reference pursuant to the last paragraph of the affidavit which states: "I have read the printed transcript of my testimony in C.D. 4542 and if I was asked the same questions relative to the subject article, my answers would be essentially identical". It may be assumed that by having incorporated the entire record in the prior *Symphonic* case, defendant is relying upon the testimony of all the witnesses.

other than just the power amplifier?—A. In order to be a receiver, it would have to have all the equipment, *possibly with the exception of the speakers.* A case, turning knobs, dial, power transformer and certain connecting wires, at least two external receptacles on the back where one could plug in a speaker and accessory equipment. I would then consider that a receiver being capable of being plugged into the ordinary house current.

On further questioning by the court, Mr. Freeland stated (R. 89–90):

JUDGE NEWMAN: Why would it need a case, Mr. Freeland?

MR. FREELAND: I was speaking now of a receiver, as it would be, as it's commonly referred to on the market, is generally in a case to protect the customer from engaging in dangerous voltages.

* * * * * * *

JUDGE NEWMAN: In other words, it's more than just a matter of physical appearance, you say?

MR. FREELAND: Oh, yes.

On direct examination, defendant's witness Fred Mergner [3] testified (R. 101–102):

Q. Mr. Mergner, could you tell us the difference between a radio tuner and a radio receiver?—A. A radio tuner, in the understanding of the hi-fidelity industry, is a particular section which is able to receive AM and FM transmissions and *a radio receiver is the combination of such a tuner plus an amplifying section.*

Q. Mr. Mergner, does a receiver have to have speakers in order to be a receiver in the industry?—A. Not necessarily. *A receiver is what I described before by itself.* However, in order to make the reception audible, you have to add speakers.

On direct examination, defendant's witness Robert A. Kulinyi [4] testified (R. 123, 127–128, 131):

Q. Does the schematic [of the imported R 835 tuner] indicate that it is a radio receiver?—A. It does.

Q. In your opinion, then, Mr. Kulinyi, based on what you have in the schematic diagram [of the imported R 835 tuner] is the imported merchandise a radio receiver?—A. In my opinion, it is a radio receiver.

* * * * * * *

Q. Mr. Kulinyi, I show you now, Plaintiff's Exhibit 1 [the imported R 835 tuner] and I ask you if you had seen this exhibit prior to coming to Court?—A. Yes, I have.

Q. And in your opinion, Mr. Kulinyi, is this unit a radio receiver?—A. In my opinion, it is.

* * * * * * *

[3] Mergner had been vice president of engineering for Fisher Radio since 1957 and had been in the field of electronics since 1938.

[4] Kulinyi was acting chief of the transmission technical area of the communications and automatic data processing laboratory of the U.S. Army Electronics Command, Fort Monmouth in New Jersey.

Q. What, Mr. Kulinyi, did you base your opinion on, in coming to the conclusion that this is a radio receiver?—A. I based it on the circuit diagram, in checking it and checking the elements of the circuit diagram against connections and the circuitry as it appears in Exhibit 1 and also the previous experience with Exhibit 2 and on my previous knowledge of receivers of this type.

* * * * * * *

Q. Mr. Kulinyi, in your opinion, are speakers properly part of a radio receiver?—A. No. Some receivers may be equipped with loudspeakers, but many of them are not.

It is apparent from the foregoing quoted excerpts from the stenographic transcript that concerning the essential elements of a "radio receiver" as it is known in the trade, Freeland's testimony sharply conflicts with that of Mergner and Kulinyi, except possibly with respect to loudspeakers, which all three witnesses seem to agree are not essential components of a receiver *per se*. Radio receivers are of such widespread and well known use that the court may take judicial notice of the fact that they are sold both with and without loudspeakers, and that frequently speaker systems are used with receivers that are not only external to the cabinet housing the receiver, but frequently are located at remote locations from the receiver itself.

Since plaintiff expressly relies upon the testimony of Mr. Freeland rather than on the court's findings of fact as set forth in C.D. 4543, this case is in the same posture as if the parties had submitted affidivits or depositions which were in disagreement on a material issue of fact. Fundamentally, summary judgment is a drastic remedy, and cannot be granted where there exists a triable issue. Here, predicated upon the testimony in the incorporated record—and the posture of the case—triable issues exist: concerning the essential components of a radio receiver, as that term is commonly understood in the electronics industry; and concerning whether a stereo "chassis" or tuner-amplifier of the type represented by the Model R860 was commonly regarded and sold in the trade as a "radio receiver". These issues of fact should be resolved after a plenary trial and not on cross-motions for summary judgment. Accordingly, the cross-motions are denied.

(C.R.D. 76–6)

S.S. KRESGE CO. *v.* UNITED STATES

Fondue sets—Entireties

Court Nos. 72–6–01275, etc.

Ports of New York, Savannah and Portland, Oreg.

[Motion for summary judgment denied.]

(Dated August 11, 1976)

Sharretts, Paley, Carter & Blauvelt (*Stephen R. Stern* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Carol A. Calhoun*, trial attorney), for the defendant.

LANDIS, Judge: Pursuant to rule 8.2 of this court plaintiff, in these five cases, moves for summary judgment sustaining its claim that merchandise imported from Japan, described on the invoices as fondue sets, should be classified as an entirety and assessed under TSUS item 653.50.[1]

Defendant opposes the motion on the ground that there are unresolved genuine factual issues which require a trial. Alternatively, defendant contends that, as a matter of law, the cases should be dismissed because customs officials correctly classified the fondue sets as articles not specially provided for of a type used for household, table, or kitchen use, and assessed the separate pieces of the fondue sets under TSUS items 653.95 and 654.10.[2]

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[1] TSUS provides for item 653.50 as follows (T.D. 68–9):

	Stoves, central-heating furnaces and burners, ranges, cookers, grates, space heaters and similar heating or cooking apparatus, all the foregoing, of base metal, not electrically operated, of types used in the household, hotels, restaurants, or offices; and parts thereof, of base metal:	
• • •	Portable types designed to be operated by propane or other gas, or by compressed air and kerosene or gasoline	• • •
653.50	Other	7% ad val. [or] 6% ad val.

[2] TSUS provides for items 653.95 and 654.10 as follows (T.D. 68–9):

	Articles not specially provided for of a type used for household, table, or kitchen use; toilet and sanitary wares; all the foregoing and parts thereof, of metal:	
•	• • • • • • •	•
	Articles, wares, and parts, of base metal, not coated or plated with precious metal:	
	Of iron or steel:	
	Not enameled or glazed with vitreous glasses:	
• • •	Cast articles, coated	• • •
• • •	Of tin plate	• • •
653.95	Other	10% ad val. [or] 8.5% ad val.
•	• • • • • • •	•
654.10	Of aluminum	2¢ per lb. + 10% ad val. [or] 1.7¢ per lb. + 8.5% ad val.

Both parties recognize that on a motion for summary judgment "the court cannot try issues of fact; it can only determine whether there are issues to be tried." *Heyman* v. *Commerce and Industry Insurance Company*, 524 F. 2d 1317, 1319 (2d Cir. 1975). Plaintiff contends that there are no genuine factual issues for the court to resolve. Defendant argues that there are several material unproven factual issues. The first issue of fact raised by defendant goes to the question of the identity of the claimed commercial entirety in terms of the individual pieces that make up the entirety. Defendant's second factual issue concerns whether, in the manner that they are used the individual pieces are being used as a new entity, or used in the fashion delineated by their separate identities as individual pieces. Bearing in mind that defendant is presumed to have found every fact necessary to support the separate classification of the individual pieces, and because the parties substantially differ as to the establishment of the material factual issues in this type of case, I conclude that summary judgment is precluded. *Nickol* v. *United States*, 501 F. 2d 1389 (10th Cir. 1974).

The imported fondue sets in this case are identified on the invoices as Kresge Code No. 5–69–30 and Kresge Code No. 5–69–26. Exhibit A, which plaintiff submits as representative of Code No. 5–69–30, consists of an aluminum yellow colored pot with a black detachable handle, a yellow cover for the pot, a black iron burner stand and an alcohol burner container with snuffer. Exhibit B, which plaintiff has submitted as representative of Code No. 5–69–26, consists of an aluminum orange colored pot with a brown handle, an orange cover, an orange tray, a black iron burner stand, and a container for sterno in the shape of a miniature pot with an attached sliding cover or snuffer of sorts. Defendant states that factually, as described on the invoices filed with the customs entries covered by this action, exhibits A and B also included six fondue forks and, in addition, exhibit A included a tray. Since exhibits A and B do not include the six fondue forks, and exhibit A additionally does not include the tray, defendant objects to the exhibits as nonrepresentative of the imported fondue sets, and contends that the missing pieces raise a genuine issue of fact between plaintiff and defendant as to what the fondue sets consist of in terms of individual pieces. Plaintiff admits that when submitted in evidence, it did mistakenly assume that Code No. 5–69–30 (exhibit A) did not include a tray. Speaking to defendant's point of controversy, however, plaintiff concedes the point, namely, that "the description found on the commercial invoices accompanying the entries the subject of plaintiff's motion for summary judgment are the true and accurate descriptions of the merchandise as commercially imported for resale in the United States" (plaintiff's reply to the opposition, page 4).

As imported, therefore, fondue set Code No. 5–69–30 (exhibit A) included a tray and six fondue forks and Code No. 5–69–26 (exhibit B) included six fondue forks.

Customs officials separately classified the fondue forks as articles *eo nomine* provided for as forks under TSUS item 650.49. Although plaintiff has elected not to contest the classification of the fondue forks, it has not established, materially or otherwise, whether fondue sets as an entirety do or do not include fondue forks. If, as a class or kind, fondue sets, commonly include fondue forks, then it would appear relevant and material to consider whether fondue sets without fondue forks are an entirety or something less than an entirety.

The issue of use raised by defendant introduces the question of which of the various criteria, e.g., "function," "use," "individual entities," "newly created entity," "intent," "design," or "commercial unit," from the doctrine of entireties should be applied in this case. *Cf. Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, 16, C.A.D. 894 (1966).

In *Miniature Fashions, supra*, the court of appeals agreed with and quoted a statement of this court that appears to be at least factually applicable here as follows:

> The difficulty which is experienced in this type of case is not so much the formulation of a workable rule as it is the application of the provisions thereof to a given factual situation. Where it is apparent that the components of an importation have no useful function until joined into a single entity, it is, of course, relatively easy to say that the result constitutes an entirety. Where, however, the several components of a unit are to any extent alone susceptible of a separate use, the question of whether their individual identities are subordinated to the newly created entity is not so readily answered. [54 CCPA, page 15.]

The two affidavits of Robert T. Rodgers, head of plaintiff's import department, filed with this motion, state that the fondue sets imported in this case were marketed, sold, and designed to be used as a unit, and that the individual pieces which comprise the fondue set have no separate commercial values. Defendent, however, is inclined to controvert those statements albeit with nothing more than argument as to the identity of the pieces that make up the entirety including the fondue forks, and the extent to which the individual pieces are susceptible to a separate use. It should also be noted that the statement in Mr. Rodgers' first affidavit (which was not cured in the second affidavit) that "the fondue *set* * * * is imported together in the same shipment and is packaged together" (emphasis added) is ambiguous and insufficient because this case involves two styled fondue sets and not one as the statement implies. In my opinion, defendant should not be summarily cut off from its right to a full

scale trial of the facts. As stated in *Heyman* v. *Commerce and Industry Insurance Company, supra,* at page 1320:

> * * * Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, * * * with the burden on the moving party to demonstrate the absence of any material facual issue genuinely in dispute * * *. This rule is clearly appropriate, given the nature of summary judgment. This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury. * * *

This court's rule on summary judgment is modeled on rule 56 of the Federal Rules of Civil Procedure. *Allen Forwarding Co., etc.* v. *United States*, 68 Cust. Ct. 66, 69, C.D. 4337, 340 F. Supp. 412, 415 (1972). It is established and accepted that:

> * * * The summary judgment procedure is properly and wholesomely invoked when it eliminates a useless trial but, of course, not when it would cut a litigant off from his right to have a jury resolve a factual issue bearing significantly on the outcome of the litigation. The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue as to any material fact, and even where his opponent comes forth with nothing, summary judgment must be denied if the facts supporting the motion do not establish the nonexistence of such an issue. Likewise, summary judgment must be denied where the movant fails to show his entitlement to a favorable determination as a matter of law. Thus, to be upheld, the summary judgment under review must withstand scrutiny on both its factual and legal foundations. [*Bloomgarden* v. *Coyer*, 479 F. 2d 201, 206, 207 (D.C. Cir. 1973).]

And:

> There is no question that under F. R. Civ. P. 56, *whether in a jury trial or a trial to the court* [emphasis added], the party opposing the summary judgment motion has a right to a full evidentiary hearing on all genuine issues of material fact. In a bench trial, this means that if the party opposing summary judgment raises any triable fact questions, he has the right to adduce the expert testimony of live witnesses and cross-examine his opponent's witnesses rather than to have to rely on the affidavits submitted in opposition to the summary judgment motion. * * * [*United States* v. *J. B. Williams Company, Inc.*, 498 F. 2d 414, 430 (footnote 19), (2d Cir. 1974).]

Upon these considerations, plaintiff's motion for summary judgment is, accordingly, denied.

(C.R.D. 76-7)

BECK DISTRIBUTING CORP. *v.* UNITED STATES

Opinion and Order on Plaintiff's Motion for Summary Judgment

Court Nos. 66/1977, etc;

Port of New York

[Motion denied.]

(Dated August 23, 1976)

Allerton deC. Tompkins for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Ira J. Grossman*), trial attorney, for the defendant.

NEWMAN, Judge: This action is before me on plaintiff's motion for summary judgment under rule 8.2. Defendant opposes the motion on the ground that there exists a genuine issue as to a material fact that requires resolution by a trial.

The issue for determination is the proper tariff classification for certain motorcycle helmets imported from West Germany through the port of New York during the period of 1961 to 1967. Depending upon the date of entry, the merchandise was assessed with duty either at the rate of 21 cents per pound plus 17 per centum ad valorem under the provision in paragraph 1539(b) of the Tariff Act of 1930, as modified by T.D. 54108, for manufactures wholly or in chief value of any product of which any resin or resin-like substance is the chief binding agent; or at the rate of 19 cents per pound plus 15.5 per centum ad valorem, or at the rate of 17 cents per pound plus 14 per centum ad valorem, or at the rate of 15 cents per pound plus 12.5 per centum ad valorem under the provision for headwear of reinforced or laminated plastics in item 703.70 of the Tariff Schedules of the United States, or under item 703.70, as modified by T.D. 66-205.

Plaintiff claims that, depending upon the date of entry, the helmets are properly dutiable at the rate of 15, 13½ or 12 per centum ad valorem under the provision in paragraph 1531 of the Tariff Act of 1930, as modified by T.D. 54108, T.D. 55615 and T.D. 55649, for wearing apparel of which leather is the component material of chief value, or at the rate of 12 per centum ad valorem under the provision in item 703.65 of the Tariff Schedules of the United States for headwear of leather.

In support of its motion, plaintiff has submitted affidavits by Sam Guevara, plaintiff's import manager; and by Wolfgang E. Petzold, export director of Hans Romer of Neu-Ulm, West Germany, the manufacturer of the helmets. Guevara's affidavit was sworn to on April 21, 1976, shortly before the filing of plaintiff's motion; Petzold's

affidavit was executed on April 17, 1975, approximately a year before the filing of the motion.

Defendant submitted a memorandum of law, but submitted no controverting documents, in opposition to plaintiff's motion.

The sole question raised by the parties is whether the helmets in issue are in chief value of leather, as claimed by plaintiff.[1]

Guevara's affidavit avers that he was plaintiff's import manager from 1960 and in that capacity ordered the helmets from Hans Romer of Neu-Ulm, West Germany; that the helmets "were ordered to be made in such a way that leather would be the component material of chief value, and the details set forth in the affidavit of Wolfgang E. Petzold, the Export Director of Hans Romer dated April 17, 1975 giving the compositions and material costs have been the basis upon which orders for the specified helmets have been placed by me for Beck Distributing Corp., namely, they must be in chief value of leather"; and that "[d]uring the period from the middle of 1963 through the middle of 1967, the [helmets] * * * were classified by the Customs officials in New York in accordance with the entry paper as being in chief value of leather, the only exceptions were for errors made either by the agent who made entry or by a new import specialist who had not previously passed upon the tariff classification of the above specified helmets".

Petzold's affidavit avers that he had been the export director of the German manufacturer for the past 20 years and was "personally familiar with all purchase and manufacturing costs" of the helmets in question; and that he had "taken cost details from the records kept by * * * [his] Company and of the 'Breakdown of raw materials and manufacturing or processing costs' attached to the invoices, and know[s] that the figures set forth below are correct and accurate". Thereafter, the affidavit sets forth a breakdown for the years 1962 through 1967 of "the purchase prices of the raw materials used in each helmet, plus * * * [the] costs of manufacturing or processing such materials up to the time when they were ready to be assembled together or mounted".

Plaintiff argues that the affidavits of Guevara and Petzold establish that the helmets are in chief value of leather. Defendant contends, in its memorandum, that "these affidavits are so deficient in factual content that they should be given no weight at all in resolving the factual dispute in this case".

The well-settled rule for determining the component material of chief value is that "the value of the materials of which an article is composed shall be ascertained at the time when they have reached

[1] But see the discussion concerning *Antonio Pompeo* v. *United States*, 40 Cust. Ct. 362, C.D. 2006 (1958), *infra*.

such condition that nothing remains to be done to them except to put them together". *United States* v. *Jovita Perez*, 44 CCPA 35, 39, C.A.D. 633 (1957); *see also United States* v. *H. A. Caesar & Co.*, 32 CCPA 142, 143, C.A.D. 299 (1945). Thus it is plaintiff's burden to establish that the cost of the leather component of the helmets, including the cost of processing the leather prior to assembly, exceeded the cost of any other component at the time the helmets were assembled.

Initially, we shall consider Guevara's affidavit. There is no showing that the affiant had any personal knowledge of or control over the manufacturer's actual costs incurred for the materials and processing thereof prior to assembly into the helmets. What costs the importer may have *specified* in its orders for component materials and the processing thereof simply does not prove what actual costs were *incurred* by the manufacturer.

Plaintiff relies heavily upon Guevara's averment that other shipments (with some exceptions) of helmets were classified by the customs officials in New York on the basis that they were in chief value of leather. However, such averment is irrelevant since plaintiff did not claim in its protests that the challenged assessments constituted an unlawful change of an established and uniform classification practice. *See Carson M. Simon & Co.* v. *United States*, 57 Cust. Ct. 224, C.D. 2768 (1966); *Bauer Alphabets, Inc.* v. *United States*, 54 Cust. Ct. 255, C.D. 2540 (1965); *Pacific Mutual Sales Co.* v. *United States*, 36 Cust. Ct. 100, C.D. 1758 (1956). And, in any event, such established and uniform practice is not at all shown by Guevara's affidavit.

Turning now to Petzold's affidavit, I find that it has several serious deficiencies. Rule 8.2(f) provides that supporting affidavits, "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and *shall show affirmatively that the affiant is competent to testify to the matters stated therein*" (emphasis added). Although Petzold's affidavit alleges his personal familiarity with "all purchase and manufacturing costs" related to the helmets in question, no basis for his asserted personal knowledge is affirmatively shown in the affidavit. Thus, for example, there is no indication that Petzold ordered or purchased the materials, or that he disbursed payment for the materials, or that he had any responsibility for manufacturing or processing the materials, or that he personally kept or supervised the keeping of cost records. In point of fact, Petzold's affidavit is completely devoid of any indication respecting his duties as "export director". Under these circumstances, the affidavit falls far short of showing *affirmatively* that the affiant possessed the requisite personal knowledge and was competent to testify concerning the matters stated in his affidavit, as required by rule 8.2(f).

Aside from the lack of an affirmative showing of the affiant's personal knowledge and competence to testify concerning the material and manufacturing costs, the affidavit is significantly lacking in cost details. While the affidavit avers that Petzold consulted "cost details from the records kept by [his] * * * company", no such records (or copies thereof) were produced in support of the affidavit.[2] Moreover, the affidavit itself does not disclose the separate costs of the materials and the labor and other expenses incurred by the manufacturer in processing those materials to the point at which they were ready for assembly into the finished helmets. While a separation of the costs of materials and the costs of processing them may not be necessary in every case, here it has been noted that all cost figures purportedly remained unchanged throughout 1962, 1963, and 1964, without any explanation of how the cost figures were calculated or why *all of the various costs remained the same to the penny over the three-year period.*[3] Defendant, with reasonable cause for doubt, has challenged these unvarying cost figures as "highly suspect on their face" and as "preposterous, especially in view of the fact that the listed cost of each material supposedly includes the cost of pre-assembly improvements made upon the material". Hence, defendant justifiably asserts that "[i]t is extremely unlikely that the costs of all of these improvements did not vary by so much as one penny for three years".

It is emphasized that unlike testimony obtained from a witness residing in a foreign country pursuant to a commission or letters rogatory (rule 7.7), which is subject to cross-interrogatories (rule 7.7(c)), affidavits offered in support of a motion for summary judgment (rule 8.2(f)) are ex-parte statements not subject to cross-examination. Inasmuch as ex-parte affidavits lack the safeguard of cross-examination, the court must give close scrutiny to such affidavits, especially here, where the issue relates to the costs of component materials for merchandise manufactured and shipped some 8 to 14 years prior to the execution of the affidavit, and the cost figures stated therein are based upon unproduced (and possibly presently unavailable) records. In this connection, compare the very recent decision of our appellate court in *Andy Mohan, Inc.* v. *United States*, 63 CCPA 104, C.A.D. 1173, 537 F. 2d 516 (1976), respecting proof of the cost of materials, fabrication, and packing for the purpose of constructed value. There, the court stated (63 CCPA at 107):

> * * * The Customs Court correctly scrutinized the affidavits with care, because, being exparte, they were not subject to cross-examination. Moreover, they are entitled to little weight,

[2] It is noted that counsel for plaintiff states in his memorandum that "any pertinent foreign records pertaining to the years 1962-1967 would *now* be difficult to obtain". (Emphasis added.) The cost records, however, were apparently available in April *1975* when Petzold allegedly examined the records of his company for purposes of executing his affidavit for use in this litigation.

[3] Even the costs of unidentified "miscellaneous materials" purportedly remained unchanged over the three-year period.

being incomplete and based on unproduced records, and having been executed years after the transactions to which they attest.

Under the circumstances herein, all elements of the asserted costs and the basis of Petzold's personal knowledge and competence to testify concerning them should have been affirmatively disclosed in his affidavit.

Although defendant did not file a counter-affidavit (or any other controverting evidence) in opposition to plaintiff's motion, under the circumstances presented here, the court is not compelled to accept as true the cost figures disclosed in the Petzold affidavit. *Cf. Subin* v. *Goldsmith*, 224 F. 2d 753, 759 (CA 2, 1955), *cert. denied*, 350 U.S. 883 (1955). In view of the substantial deficiencies in Petzold's affidavit, especially as it relates to cost data peculiarly within the knowledge of the German manufacturer, I conclude that there is a genuine issue of fact, and that plaintiff is not entitled to summary judgment.

Finally, although the parties have limited the issue to component material of chief value, and have raised no issue concerning common meaning, I have noted that helmets, such as those involved here, have been held not to be within the common meaning of the term "wearing apparel" in paragraph 1531 of the Tariff Act of 1930, as modified by T.D.'s 52373 and 52476. *Antonio Pompeo* v. *United States*, 40 Cust. Ct. 362, C.D. 2006 (1958). Indeed, *Pompeo* may be deemed *stare decisis* insofar as plaintiff's claim under paragraph 1531 is concerned. *Cf. United States* v. *L. Batlin & Son, Inc.*, 61 CCPA 17, C.A.D. 1111, 487 F. 2d 916 (1973).

Accordingly, plaintiff's motion is denied.

(C.R.D. 76–8)

ED ALEXANDER *v.* UNITED STATES

On Plaintiff's Motion To Set Aside Order of Dismissal and for Suspension

Court No. 74–4–01007

Port of Los Angeles

[Motion denied.]

(Dated August 25, 1976)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

NEWMAN, Judge: Plaintiff has moved to set aside this court's order entered on July 16, 1976, dismissing the action for lack of prosecution.

Additionally, plaintiff seeks suspension of the case under a pending test case. Defendant opposes setting aside the dismissal on the ground that plaintiff's motion fails to comply with the rules of the court.

For the reasons stated, plaintiff's motion is denied.

The background of the present proceedings, briefly, is: It appears that the two-year period this case could remain in the reserve file was due to expire on April 30, 1976. On that very date, plaintiff moved* to extend the time within which the case could remain in the reserve file until June 30, 1976. Defendant opposed plaintiff's motion for extension of time on the ground that the motion stated no reasons for the extension. Plaintiff interposed no response to defendant's opposition; but on July 7, 1976 plaintiff filed a motion to suspend the case. On July 16, 1976 this court entered an order dismissing the case for lack of prosecution, and consequently the motion to suspend became moot.

Plaintiff now seeks to vacate the order of dismissal and again seeks to suspend the case. Defendant contends that plaintiff's motion fails to comply with rule 12.1(b). That rule reads:

> (b) Grounds: Such motion must clearly state the grounds upon which the moving party relies for the granting of such rehearing or retrial. If the grounds do not appear of record, the motion must be supported by an affidavit or affidavits setting forth in detail the facts upon which such motion is predicated.

In a word, defendant's opposition to plaintiff's motion is meritorious. Plaintiff has offered absolutely no reason—and indeed made no effort whatever to submit any reason—to indicate why the order of dismissal was improper; nor did plaintiff state any ground whatsoever for a rehearing. Moreover, plaintiff did not support its motion with an affidavit "setting forth in detail the facts upon which such motion is predicated". Plainly, there has been a failure by plaintiff to comply with rule 12.1(b), and no cause is shown for reconsideration of the order of July 16, 1976. This court does not desire to swallow a camel or strain at a gnat. The short of the matter is that plaintiff has created a procedural morass. Rule 12.1(b) is not a snare, nor does it show a fascinating resemblance to an illusion. Indeed, its provisions are crystal clear.

Accordingly, plaintiff's motion must be denied.

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*Parenthetically, the moving papers contained a certificate of service stating that said application had been served by mailing on April 30, 1976. However, the Clerk rejected the motion on the ground that the envelope was postmarked May 1, 1976, and the motion was actually received by the Clerk on May 4, 1976. Plaintiff subsequently moved to correct the date of filing of the motion, and the court granted such motion.

(C.R.D. 76–9)

THE AMERICAN GREINER ELECTRONIC, INC. *v.* UNITED STATES

Watch timers—Valuation

Court Nos. R61/20887, etc.

Port of New York

[Motion for summary judgment denied.]

(Dated September 3, 1976)

Barnes, Richardson & Colburn (*Jospeh Schwartz* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: Plaintiff, in this consolidated action, moves for summary judgment [1] sustaining its claim that watch timers, imported from Switzerland and appraised on the basis of constructed value, [2] should properly be valued on the basis of export value. [3]

Inter alia, plaintiff contends that, as a matter of fact, it cannot be genuinely contested that the merchandise and issues in this case are the same in all material respects as the merchandise and issues in *United States* v. *The American Greiner Electronic, Inc.*, 66 Cust. Ct. 644, A.R.D. 289, 328 F. Supp. 498 (1971); that, on export value basis, the merchandise in this case was sold in the ordinary course of trade to a selected purchaser at a price which fairly reflects the market

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[1] United States Customs Court Rule 8.2.

[2] 19 U.S.C.A. § 1401a(d) defines constructed value as follows:

(d) For the purposes of this section, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

[3] 19 U.S.C.A. § 1401a(b) defines export value as follows:

(b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

value of the merchandise, and that the invoice prices were the result of *bona fide* negotiations between the seller and the purchaser.

Defendant opposes the motion on the ground that the merchandise and issues are unlike the merchandise and issues in *American Greiner*, *supra*. Defendant, *inter alia*, also states that it materially disputes the fact that the merchandise was sold in the ordinary course of trade; that the merchandise was sold to a selected purchaser at a price which fairly reflects the market value of the merchandise, or that the invoice prices were the result of *bona fide* negotiations between the seller and purchaser.

In a cross-motion, which plaintiff opposes, defendant further seeks an order "allowing the use of the discovery procedures authorized by the Rules of this Court to obtain the deposition of directors and officers of plaintiff, including, but not limited to, Rudolf Greiner, Sr., the president and sole owner of plaintiff, and Rudolf Greiner, Jr.", identified as not available in the United States.

I conclude that both motions should be denied.

Plaintiff places great reliance on the decision in *American Greiner* to sustain its claim in this case. That case involved one watch timer, a "Chronografic Record" model exported from Switzerland in August 1960. This consolidated action involves some fifteen different models of watch timers exported in years other than 1960. The value of merchandise is its statutory value on the date or dates of exportation, *Erb & Gray Scientific, Inc.* v. *United States*, 53 CCPA 46, C.A.D. 875 (1966). Defendant, in opposition, quite obviously differs with plaintiff with respect to facts material to a finding of statutory export value. Speaking for the United States Court of Appeals, Second Circuit, in *Heyman* v. *Commerce and Industry Insurance Company*, 524 F. 2d 1317, 1319 (2d Cir. 1975), Chief Judge Kaufman, concerned with the frequent recurrence of cases in which granting summary judgment was inappropriate, cautioned that

> * * * the "fundamental maxim" remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. * * * Moreover, [4] when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, * * * with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute * * *. This rule is clearly appropriate, given the nature of summary judgment. This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury. * * *

[4] See also, *S. S. Kresge Co.* v. *United States*, 77 Cust. Ct. 154, C.R.D. 76-6 (1976)

In *United States* v. *J. B. Williams Company, Inc.*, 498 F. 2d 414, 430 (footnote 19), (2d Cir. 1974), Judge Friendly, in his written opinion for the Court of Appeals, stated:

> There is no question that under F.R. Civ. P. 56, *whether in a jury trial or a trial to the court* [emphasis added], the party opposing the summary judgment motion has a right to a full evidentiary hearing on all genuine issues of material fact. In a bench trial, this means that if the party opposing summary judgment raises any triable fact questions, he has the right to adduce the expert testimony of live witnesses and cross-examine his opponent's witnesses rather than to have to rely on the affidavits submitted in opposition to the summary judgment motion. * * *

Since there are material differences between plaintiff and defendant with respect to relevant facts, I am of the opinion that defendant should not be summarily cut off from its right to a full scale trial of the facts. *Nickol* v. *United States*, 501 F. 2d 1389 (10th Cir. 1974). Plaintiff's motion for summary judgment is, accordingly, denied.

For substantially the same reasons that I discussed in connection with defendant's motion in *Life-O-Matic Products, Inc., et al.* v. *United States*, 72 Cust. Ct. 306, C.R.D. 74–6 (1974), defendant's cross-motion for an order allowing discovery procedures to obtain a deposition is also denied.

(C.R.D. 76–10)

FAIRFIELD GLOVES ET AL. *v.* UNITED STATES

Motion to Correct Filing Date and Cross-Motion to Suspend

1. LEGISLATIVE DELEGATION OF AUTHORITY

Rules of court adopted in conformity with authority delegated by statute to make rules of practice, pleading and procedure have the same force and effect as if expressly included in the statute.

2. ACTION PURSUANT TO DELEGATED AUTHORITY

Where Congress in 28 U.S.C.A. § 2632(a) delegates to the Customs Court authority to determine the manner of filing a summons, and mailing is recognized in statutes and decisions as a manner of filing, the Customs Court's promulgation of rule 3.2(b) which deems the date of mailing as the date of filing is a proper exercise of the delegated authority.

3. A MOOT CASE

Where due to a change in circumstances before decision an actual controversy has ceased to exist the case is moot.

Court Nos. 76–1–00301, etc.

Port of Los Angeles

[Motion to correct records of clerk granted; cross-motion to suspend denied.]

(Dated October 15, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiffs.

Rex E. Lee, Assistant Attorney General (*Edmund F. Schmidt*, trial attorney), for the defendant.

RICHARDSON, Judge: On January 30, 1976 the clerk of the Customs Court received by certified mail from plaintiffs' counsel summonses and filing fees in five cases which were required to be filed January 28, 1976. The certified mail envelope containing the summonses and filing fees did not contain a postmark date. Plaintiffs' counsel made an affidavit that they were mailed by certified mail January 28, 1976, and attached to his motion to have the date of filing corrected to January 28, 1976 (the 180th day after the denial of the plaintiffs' protests), as an exhibit, his receipt for certified mailing which is date-stamped January 28, 1976.

The defendant accepts January 28, 1976 as the date of certified mailing, but challenges the validity of rule 3.2(b) which does not require that the date of physical receipt of the summons by the clerk be the only acceptable *method* or *manner* of filing, and deems the summonses as filed on the date of certified mailing. The defendant contends that the summonses were not filed until physically received by the clerk of court, January 30, 1976 (182 days after the denial of plaintiffs' protests), and that the court was acting *ultra vires* when it adopted rule 3.2(b); and in the defendant's opinion enlarged the statutory jurisdiction of the court. In a cross-motion the defendant moved that the plaintiffs' five "actions" (four of which it regarded as untimely filed) be suspended pending the final determination of *Gotham Knitting Mills, Inc.* v. *United States*, Customs Court No. 75–10–02525.

Because the defendant was in effect seeking by its cross-motion to suspend "motions" rather than "actions" which it contended were untimely filed, and there is no provision in the statutes or rules for suspending one motion pending the final determination of another motion, and the controversy which arose over whether motions challenging the validity of court rules should be determined by a single judge or a panel of three judges, the court elected to hold in abeyance the action on the motion and cross-motion pending disposition of the *Gotham Knitting Mills, Inc.* case.

Before any ruling was made by the Customs Court on rule 3.2(b) in the *Gotham Knitting Mills, Inc.* case, the plaintiff acting under rule

8.3(a)(1), which permits a plaintiff to abandon its action without order of court at any time before service of a notice of trial, duly abandoned its action, while a petition for a writ of prohibition by the defendant against a three-judge panel passing upon the validity of rule 3.2(b) was pending in the Court of Customs and Patent Appeals. The plaintiff's abandonment of its action made the issue of the validity of rule 3.2(b) moot.

The disposition of the *Gotham Knitting Mills, Inc.* case leaves the issue of the validity of rule 3.2(b) still unresolved.

The nature of the Customs Court as a national court presupposes that there must necessarily be mailings of summonses from a large number of geographical areas. There are numerous varieties of ways in which letters are processed in the postal service today resulting in difficulties of determining the exact date a letter is deposited in the mails addressed to the clerk of the United States Customs Court.

1. Many letters deposited in the mails today contain only the name of the city and state in which the letter was deposited, with no date.

2. Some machines do not show the city and state in which the letter was deposited or the date.

3. The date stamped is not clear on some letters.

4. Some mail contains the city and date stamp but it in fact may not start to travel from that city where deposited to the destination indicated until several days after deposit. For instance, a letter date-stamped in New Rochelle or Pelham, New York, is sent to Mount Vernon, New York, for sorting and dispatching. This is known as zone sorting, which can delay actual travel of the letter to the addressee from the date of deposit.

5. The failure to put the zip code on an envelope delays the processing as the computer will reject a letter without the zip code and such letter may be laid aside for a day or two until someone ascertains the zip code and places it on the envelope by hand.

6. Postage meter machines which may be used by some persons sending mail to the court can be adjusted to show a date other than the actual date of mailing.

7. The time it takes a letter to travel from place of deposit to destination, these days, is such a variable that it is sometimes very difficult, if not impossible, to determine what is the "ordinary course of mail".

It is common knowledge that mail service has deteriorated considerably in recent years. A person using the mails today can no longer estimate with any degree of consistency when a letter he deposits in the mails might reach the addressee. The Customs Court was aware of this situation and felt that the former rule of the court

3.2(d)(3) which permitted a correction of the date of filing a summons upon a showing by satisfactory proof:

> . . . that the summons was sent by registered or certified mail, properly addressed to the clerk of the court . . . with return receipt requested; that it was deposited in the mail sufficiently in advance of the last date allowed for filing to provide for receipt by the clerk on or before such date in the ordinary course of mail; and that the person sending the summons exercised no control over the mailing between the deposit of the summons in the mail and its delivery.

worked a hardship particularly on lawyers at outports to have to travel to New York to present proof of timely mailing. Also, it placed a heavy burden upon the court to constantly have to decide whether a summons was filed within such reasonable time as to have been received in fact by the clerk before the last date for filing had passed, upon muddied evidentiary situations due to varied handling of the mails and irregular deliveries of the postal service, or permit injustice to take its toll because of the uncertainty of the mail situation.

After considerable study of the rules of the Customs Court by its Rules Committee and consultation with representatives of the Customs Bar and the Department of Justice, the Customs Court deleted rule 3.2(d)(3) and unanimously adopted the rule in issue, rule 3.2(b), with full knowledge of the Department of Justice's argument that by rule 3.2(b) the court would be extending its jurisdiction and acting *ultra vires*.

Rule 3.2(b) was proposed and adopted to obviate injustices which would result in rigidly adhering to a single interpretation of the word "filing" to mean actual physical presence and receipt of a required summons in the hands or office of the clerk of the court on a given day, in view of the postal service situation.

The important consideration when an issue is raised as to service of any document is whether it was made within the contemplation of the statute and rules of the court.

28 U.S.C.A., section 2631(a) provides:

> An action over which the court has jurisdiction under section 1582(a) of this title is barred unless *commenced* within one hundred and eighty days after:
>
> (1) the date of mailing of notice of denial, in whole or in part, of a protest . . . . [Emphasis added.]

28 U.S.C.A., section 2632(a) provides:

> . . . A civil action shall be *commenced by filing a summons in the . . . manner, . . . prescribed in rules adopted by the court.* [Emphasis added.]

Rule 3.2(b) provides: "For purposes of *commencement* of an action, a summons sent by registered or certified mail properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007, with the proper postage affixed and return receipt requested, shall be *deemed filed* as of the date of postmark." (Emphasis added.)

It is the opinion of the court that section 2631 does not say that anything shall be "filed" within 180 days; the words "file", "filed" and "filing" are not in that section. It just says an action shall be "*commenced*" within 180 days. It does not say *how* an action is to be commenced. Section 2632(a) says *how* an action shall be commenced and that is by filing a summons in the "*manner*" *prescribed in rules adopted by the court.* The word "*manner*" is defined in Black's Law Dictionary, Fourth Edition, 1951, at page 1115, as: "A way, mode, *method* of doing anything, or mode of proceeding in any case or situation." (Emphasis added.)

It is submitted that section 2632(a) delegates to the Customs Court the authority to prescribe in its rules the "*manner*" or *method* of filing a summons. The statute does not prescribe that the summons be "filed with" any specified person. Congress could have specified that "filing shall be with the clerk", but it chose to delegate authority to the Customs Court to determine the "manner" of filing the court deemed best in the light of its experience with procedures under the Customs Courts Act of 1970. Judge Newman in an opinion in *Texas Mex Brick & Import Co.* v. *United States*, 72 Cust. Ct. 291, 294, C.R.D. 74–2, 371 F. Supp. 579 (1974), a case under the former rule 3.2(d)(3) permitting a correction of the date of filing a summons upon satisfactory proof, stated: "I am clear that this court has authority to explicitly provide that something other than receipt may constitute the filing of the summons, particularly since under section 2632(a) Congress specifically authorized this court to adopt rules governing the 'manner' of filing a summons."

Judge Maletz in following *Texas Mex* in *Modern Clothing, Inc.* v. *United States*, 73 Cust. Ct. 233, 236, C.R.D. 74–10 (1974), expressed his view as being "in entire accord with the decision in *Texas Mex* and therefore hold that rule 3.2(d)(3) is a statutorily valid exercise of the court's authority."

The court in rule 3.2 has exercised its delegated authority by providing that a plaintiff may "*commence*" an action in two "*manners*" or "*methods*": (1) physically filing a summons with the clerk of court or (2) using registered or certified mail to send a summons to the court as provided in subparagraph (b) of said rule and it will be "deemed filed" as of the date of postmark.

"*Deemed*" is defined in Black's Law Dictionary as: "To hold; Consider; adjudge; . . . determine; treat as if; construe."

The word "deemed" has been used to go so far as to treat a summons as timely filed when there wasn't even a summons in existence in the case. See section 122(c) of Pub. L. No. 91–271:

> (c) A protest timely filed with the Bureau of Customs before the effective date of enactment of this Act, which is disallowed before that date, and as to which trial has not commenced by such date, shall be *deemed to have had a summons timely and properly filed* under this title. [Emphasis added.]

Rule 22(2) of the Supreme Court of the United States provides in part that:

> . . . If the original judgment in such a case was entered in a district court in Alaska, Guam, Hawaii, Puerto Rico, the Virgin Islands, or the Canal Zone, the petition [for certiorari] shall be *deemed filed in time if mailed by air-mail under a postmark dated within the thirty-day period or due extension thereof.* [Emphasis added.]

Federal, New York State and New York City income tax returns have to be filed each year on April 15, but mailing on the 15th is *deemed filed* on the 15th, in all three jurisdictions.

Rule 3.2(b) does not extend the statutory period for *filing* a summons, since if the requisites of specified mailing are complied with, the summons is *deemed* filed (viz., on the last date allowed under section 2631(a)(1).

Admittedly there are decisions in courts of appeals applying, in general, a strict construction of the provisions in customs laws fixing the time in which appeals or other documents must be filed with such courts. Among such cases is *United States* v. *Thompson-Starrett Co.*, 12 Ct. Cust. Appls. 28, T.D. 39896 (1923), in which the time for filing an appeal, sixty days, expired on April 1, 1923, a Sunday, and the plaintiff deposited its notice of appeal in the mail in New York City addressed to the clerk of the Court of Customs Appeals in Washington, D.C., on March 31, 1923, a Saturday; and the appeal was received in the office of the clerk on April 2, 1923, a Monday, which was the sixty-first day after the entering of judgment.

The Tariff Act of 1922, section 515, title IV, in effect when the *Thompson-Starrett* case was decided provided that:

> . . . an appeal shall be filed in the United States Court of Customs Appeals *within the time and in the manner* provided by law. [12 Ct. Cust. Appls. at p. 29.] [Emphasis is added to indicate the statute makes abundantly clear that "time" and "manner" are not synonymous.]

The court held that the mailing of an application for appeal *within the time* allowed for appeal was not *in the manner* of filing prescribed by the statute, and that it was incumbent upon an appellant to have the

application for appeal in the office of the clerk of the court within the time allowed. The statute expressly prescribed that an appeal shall be "filed in the United States Court of Customs Appeals." The court recognized, however, that "depositing in the mail is sufficient filing" provided that statute treats mailing as filing. 12 Ct. Cust. Appls. at p. 31.

The Court of Customs and Patent Appeals followed the *Thompson-Starrett* case in *Minkap of California, Inc.* v. *United States;* 55 CCPA 1, C.A.D. 926 (1967), a case in which a motion for rehearing was mailed within a thirty-day time limitation, but not received by the clerk until after the expiration of the thirty-day time limitation. The statute involved required a motion for rehearing to be "made" within thirty days and the term "made" was construed to mean "filed". The court regarded the situation in the *Minkap* case as analogous to the *Thompson-Starrett* case and at page 3 reiterated that depositing in the mail will not be regarded as sufficient filing and compliance with a statute which prescribes that filing must be at a definite place and within a specified time.

In another case, *Seneca Grape Juice Corp.* v. *United States*, 61 CCPA 118, 492 F. 2d 1235 (1974), the Court of Customs and Patent Appeals denied a petitioner's motion to have a notice of appeal, postmarked in New York City, January 25, 1974, and received in the clerk's office on January 29, 1974, one day later than the sixty-day period for filing notices of appeal, accepted *nunc pro tunc* as of January 28, 1974. The appellate court in a per curiam opinion, followed its decision in *Minkap of California, Inc.* v. *United States*, and stated that its rule 3.1(a) requires that a notice of appeal must be filed "in the office of the clerk of the court", and that rule 25(a) of the Federal Rules of Appellate Procedure provides that filing may be accomplished by mail addressed to the clerk but "filing shall not be timely unless the papers are *received by the clerk* within the time fixed for filing . . . ."

The foregoing two rules do not contain a provision similar to that in rule 3.2(b) of the Customs Court, and the second rule, rule 25(a) of the Federal Rules of Appellate Procedure expressly requires receipt by the clerk of a notice of appeal within the time fixed for filing. It is submitted that what constitutes filing under rules of federal appellate procedure is to be distinguished from what constitutes filing under the rules of the Customs Court.

In the *Thompson-Starrett* case, the *Minkap* case, and the *Seneca Grape Juice* case there was no statute involved, as in the instant case, delegating authority to the court to promulgate by rule of court the *manner* or method of filing an appeal, nor was there any rule of court, pursuant to such delegation of authority, in existence recognizing mailing as an alternate *manner* or method of filing an appeal. It is

submitted that in 1970 when Congress enacted 28 U.S.C.A. § 2632(a), delegating to the Customs Court authority to provide in its rules the "manner" of filing a summons, it must have contemplated that the Customs Court might provide for the alternate "manner" of filing recognized as proper, if duly authorized, in the *Thompson-Starrett* case—namely mailing. Rules of court adopted in conformity with authority delegated by statute to make rules of practice, pleading, and procedure have the same force and effect as if expressly included in the statute. *District of Columbia* v. *Hunt*, 163 F. 2d 833 (D.C. Cir. 1947); *MacNeil* v. *Hearst Corp.*, 160 F. Supp. 157 (D. Del. 1958); *Carlis* v. *Stratigos*, 186 Misc. 337, 61 N.Y.S. 2d 456 (N.Y. Sup. 1946).

Between the time the *Thompson-Starrett* case was decided in 1923 and the enactment of 28 U.S.C.A. § 2632(a), in 1970, the federal trial courts had adopted what has sometimes been described as a liberal approach in the application of periods of limitation in their rules and decisions.

The Federal Rules of Civil Procedure in rule 6(a) promulgated pursuant to 28 U.S.C.A. § 2072 provides that when the last day for taking an action expires on a Saturday, a Sunday, or a legal holiday, the statutory period runs until the end of the next day which is neither a Saturday, a Sunday, nor a holiday. Many federal court decisions prior to this rule were to the contrary.

The Court of Appeals for the Fifth Circuit in construing this rule in *Wilson* v. *Southern Ry. Co.*, 147 F. 2d 165 (5 Cir. 1945) said at page 166:

> . . . The committee reports and discussions preliminary to the formulation of the rules indicate that the purpose was to change the *method* of computing the three-month period prescribed by the statute under consideration, and the language of the rule clearly effectuates that intent. The rule does not attempt to change a jurisdictional statute, but merely provides *a method of computing the statutory period* different from that fixed by judicial decision. . . . [Emphasis added.]

Other decisions to the same effect are: *Jacobs Pharmacy Co., Inc.* v. *United States*, 71 F. Supp. 584 (N.D. Ga. 1947) and *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949). In the latter case at pages 40–41 Mr. Justice Douglas held that where the last day of the period within which a review by certiorari might be filed falls on a Sunday or legal holiday, a filing on the next day which is not a Sunday or legal holiday is timely. Mr. Justice Douglas stated: "That rule [6(a), a rule of the district courts] provides the *method* for computation of *time* prescribed or allowed not only by the rules or by order of court but by 'any applicable statute.'" (Emphasis added.) He further stated: " . . . we think that the considerations of liberality and leniency which

find expression in Rule 6(a) are equally applicable to 28 U.S.C. § 2101(c) [with respect to petitions for certiorari]. The appeal therefore did not fail for lack of timeliness."

The Customs Court in a decision in 1952, *Thalson Co.* v. *United States*, 28 Cust. Ct. 536, R.D. 8080, followed the liberal approach in the application of periods of limitation as reflected in rule 6(a) of the federal rules, in a situation where the time for filing an appeal for a reappraisement (30 days) expired under the Tariff Act of 1930 on August 23, 1947, a Saturday, and the court held its receipt on the next day that the office was regularly open for business August 25, 1947, a Monday, was timely. This decision was affirmed in a review by the Second Division of the Customs Court in 32 Cust. Ct. 663, A.R.D. 40 (1954). The decision of the *Thalson* case on timeliness was followed in *Hawaiian Oke & Liquors, Ltd.* v. *United States*, 28 Cust. Ct. 58, C.D. 1388 (1952); *Railway Express Agency, Inc.* v. *United States*, 30 Cust. Ct. 424, Abs. 57260 (1953); *Lustre Fibers, Inc.* v. *United States*, 31 Cust. Ct. 318, Abs. 57663 (1953); *F. W. Myers & Co., Inc.* v. *United States*, 35 Cust. Ct. 38, C.D. 1718 (1955). It was embodied in rule 37 of the Customs Court in 1955. The rule has been consistently followed by the Customs Court for over 21 years, and is now rule 3.6(a).

It is the view of this court that rule 3.2(b) is a proper exercise of authority delegated to the Customs Court in 28 U.S.C.A. § 2632(a), and is in line with the liberal approach to periods of limitation reflected in Customs Court rule 3.6(a), Federal Rules of Civil Procedure 6(a), Supreme Court of the United States rule 22(2), and the court decisions under these rules. It is not *ultra vires* and it does not enlarge the statutory jurisdiction of the Customs Court. It is not inconsistent with law and is deemed necessary for the orderly functioning of the Customs Court.

There is a reported decision of the Customs Court holding rule 3.2(b) to be invalid in that the rule permits a summons mailed before the expiration of the period for filing, but received after the period for filing, to be deemed filed and thus timely. *Harold Koren & Co., Inc.* v. *United States*, 76 Cust. Ct. 159, C.D. 4651, 10 Cust. Bul. No. 25, p. 28 (May 26, 1976). This case is not *stare decisis* of the issue of the validity of rule 3.2(b) as the issue in that case had become moot before the judge undertook to decide the case, and the decision is given no weight in this opinion.

The function of a decision is to decide a controversy affecting the rights of some party to the litigation. Where due to a change in circumstances before decision an actual controversy has ceased to exist and there is no live question to decide, a decision whether or not relief should be granted is an empty formality and of no effect.

Facts extrinsic to the reported decision in the *Koren* case, but part of the official file show the issue in that case to have been moot May 18, 1976, eight days before the date of decision, May 26, 1976.

At a hearing on the *Gotham* case, May 18, 1976, the court made an inquiry of plaintiff's counsel as to what disposition he proposed to make in the *Koren* case, a similar case involving two protests that was not calendared for hearing that day. Plaintiff's counsel responded that ". . . if it is appropriate, your Honor, we would make a motion at this time to have those cases abandoned. If it is not, we will file a Notice of Abandonment." (R. 17.) Defendant opposed abandonment and the court reserved decision on the motion to abandon. Subsequently, on the same day, plaintiff filed a notice of abandonment pursuant to rule 8.3 which led to the dismissal of the case by the clerk on May 21, 1976.

On May 24, 1976, the court took the position that since a motion for leave to abandon was pending, the notice of abandonment filed by plaintiff should not be given effect and that the motion for leave to abandon should be denied, and made the following orders:

> ORDERED, that the dismissal of the case entered by the clerk be set aside, and it is further
>
> ODERED, that plaintiff's motion to abandon this action be and the same hereby is denied, and it is further
>
> ORDERED, that the notice of abandonment filed by plaintiff be rejected, and it is further
>
> ORDERED, that the Clerk make the appropriate entries in the docket sheet of this case to reflect the actions taken in this order.

Rule 8.3(a)(1) of the Customs Court provides that:

> . . . Before service of notice of trial, an action may be voluntarily abandoned and dismissed, without order of court, by filing a notice of abandonment . . . .

Part (iv) of said rule provides that:

> (iv) When an action is abandoned by notice of abandonment, the clerk, without order of the court, shall make an appropriate entry of dismissal . . . .

There was no notice of trial filed in the *Koren* case, and the plaintiff and clerk did what rule 8.3(a)(1) prescribes to accomplish the dismissal of the case at any time before a notice of trial. Their action ended the trial judge's jurisdiction, and his attempt to resurrect and breathe life into a case after a proper dismissal, without an order to show cause as to why compliance with rule 8.3(a)(1) should not be nullified and the clerk's entry of dismissal should not be opened or vacated, is ineffective. When the plaintiff voluntarily abandoned its action the case became moot.

Ordered that the date on the summonses of filing of the five actions listed on the attached schedule "A" shall be corrected to and hereby

is established as being January 28, 1976, and the cross-motion to suspend is denied.

Notwithstanding the disposition made herein the court deems it appropriate to state that it appears that a controlling question of law is involved in this case which contains an issue important to the whole bar and should be decided and resolved with finality at the earliest possible date; and an immediate appeal from this order may materially advance the ultimate determination of the action. Therefore, an interlocutory order is granted for application to be made to the Court of Customs and Patent Appeals for an appeal within 10 days after entry of this order.

(C.R.D. 76–11)

GEHRIG, HOBAN & CO., INC. *v.* UNITED STATES

OPINION AND ORDER ON PLAINTIFF'S MOTION TO VACATE SANCTIONS

Court No. R68/17303

[Motion by plaintiff granted in part.]

(Dated October 22, 1976)

Busby Rivkin Sherman Levy and Rehm (*Saul L. Sherman* and *Joseph S. Kaplan* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Joseph I. Liebman* and *Edmund F. Schmidt,* trial attorneys), for the defendant.

NEWMAN, Judge: On June 18, 1976 this court granted defendant's motion to impose sanctions on plaintiff pursuant to rule 6.5(b)(2), predicated on plaintiff's failure to comply with the court's order of December 1, 1975, compelling discovery. *Gehrig, Hoban & Co., Inc.* v. *United States,* 76 Cust. Ct. 277, C.R.D. 76–3 (1976). The sanctions were expressly made subject to vacatur if, within sixty days of the order, plaintiff served defendant with supplemental answers to certain interrogatories *fully* supplying the information requested. Further, the court's order provided that plaintiff could comply, either: by identifying the documents mentioned in the interrogatories, or by voluntarily producing such documents for inspection and copying within the sixty days permitted for serving supplemental answers.

Within the sixty-day period granted, plaintiff served defendant with supplemental answers and documentary exhibits. Plaintiff now moves to vacate the sanctions imposed by the order of June 18th. Defendant has interposed no objection to such vacatur, except with

respect to interrogatories numbered 24 (a) and (h), and 27 (b) through (e), which defendant contends have not been answered adequately.[1]

While admitting that plaintiff has furnished "some information", defendant insists that the interrogatories seek to elicit, *inter alia*, specific cost, expense and profit *figures*, not merely a *description* or *enumeration* of various types of costs and expenses. Plaintiff on the other hand, urges that the interrogatories requested merely that the figures be "described" and "located", but not "furnished".

The court is constrained to agree with defendant's contention that a reasonable interpretation of the interrogatories in question requires that plaintiff must disclose in its answers not merely an enumeration or description of different types of costs and expenses, but also the figures as well.[2] However, a careful examination of the supplemental answers submitted with plaintiff's motion fails to show that the cost, expense and profit figures were furnished. Despite the assertion of plaintiff's counsel that "detailed cost figures" were submitted in various affidavits and "representative internal cost accounting records", and that "prices are ascertainable from the pleadings herein", the absence of the *pertinent* cost, expense and profit figures *in the answers to the interrogatories*, leaves the interrogatories inadequately answered.

In support of the motion to vacate, counsel for plaintiff has submitted an affidavit detailing plaintiff's efforts to obtain and supply the information requested by the interrogatories and to comply with the court's order. While the facts recited in counsel's affidavit and the substantial supplemental information furnished to defendant clearly demonstrate plaintiff's good faith efforts to comply with the order of June 18th, the court must nevertheless agree with the defendant's position that "plaintiff should * * * be precluded from surprising the defendant at trial by 'discovering' additional evidence (i.e., testimony or other means) that falls within the scope of these interrogatories".

It is well settled that the purpose of our discovery rules is to open the door of pretrial inquiry to the point where information which is relevant to the subject matter involved in the pending action, and normally in the possession or control of one party, may be obtained by the other in the interests of truth and justice, and to remove the element of surprise from the litigation. A party should not in any event be required to await a trial of the action to discover for the first time

[1] Defendant concedes that all other interrogatories propounded to plaintiff have been adequately answered.

[2] It is also noted that interrogatory no. 24(a) seeks to elicit disclosure respecting the markets by country in which the costs were incurred, as well as the time period applicable to such costs. However, the footnote on page 19 of plaintiff's supplemental answers states, "On this as on all other similar incidental marketing costs, Charmilles does not maintain separate cost accounting records according to country of designation".

facts and circumstances which might have been of assistance in that party's pretrial preparation, and would have in all likelihood apprised that party of the disputed issues.

Candidly, this court is greatly anguished by the substantial time, labor and expense on plaintiff's part necessitated herein by the broad scope of the propounded interrogatories. But on the other hand, the scope of the information requested by defendant is merely reflective of the broad scope of plaintiff's claims and the apparent complexity of the issues. The pleadings indicate that the merchandise was appraised on the basis of United States value pursuant to section 402(c) of the Tariff Act of 1930, as amended. Plaintiff claims that the proper basis for appraisement is export value as defined in section 402(b), as amended; or in the alternative, United States value pursuant to section 402(c), as amended; or alternatively, constructed value under section 402(d), as amended. It is plain, then, that plaintiff's multiple alternative value claims interject many issues into this reappraisement case and have opened the door to the breadth of discovery with which plaintiff is faced here.

It is the conclusion of the court that interrogatories numbered 24 (a) and (h), and 27 (b) through (e), have not been properly responded to by plaintiff in its supplemental answers. However, under all the facts and circumstances, and in view of the good faith efforts demonstrated by plaintiff herein, the order of June 18, 1976 is modified as follows:

1. Plaintiff is granted an additional sixty days in which to furnish defendant with further supplemental answers disclosing the cost, expense and profit figures (and all the other information) sought to be elicited by interrogatories numbered 24 (a) and (h), and 27 (b) through (e). Should plaintiff fail to comply with the foregoing directive, it shall be precluded from introducing at trial of the issues in this action, or presenting in conjunction with the filing of a dispositive motion, any evidence which is related to the answers presently sought by defendant respecting interrogatories numbered 24 (a) and (h), and 27 (b) through (e).

2. In all other respects, plaintiff's motion for vacatur is granted.

(C.R.D. 76–12)

GUY B. BARHAM CO. ET AL. *v.* UNITED STATES

Court Nos. 75-10-02564, etc.

Ports of Los Angeles, New York, and Louisville

[Motion to dismiss and sever and dismiss denied.]

(Dated October 29, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiffs.
Rex E. Lee, Assistant Attorney General (*Edmund F. Schmidt*, trial attorney), for the defendant.

RICHARDSON, Judge: The question in this case is the same as the question raised in the case of *Fairfield Gloves et al.* v. *United States*, 77 Cust. Ct.166, C.R.D. 76–10, 10 Cust. Bul. No. 45, p. 50 (October 15, 1976), that is, whether the words "form, manner and style" are synonymous, and require that a summons must in all instances be physically received in the office of the clerk on or before the last day for filing in order for the Customs Court to acquire jurisdiction, or whether the court may by rule adopted pursuant to statutory authority deem a summons filed as of the date it is mailed as provided in Customs Court rule 3.2(b).

In the *Fairfield* case the court held that rules of court adopted in conformity with authority delegated by statute to make rules of practice, pleading and procedure have the same force and effect as if expressly included in the statute. The court further held that where Congress in 28 U.S.C.A. § 2632(a) delegates to the Customs Court authority to determine the manner of filing a summons, and mailing is recognized in statutes and decisions as a manner of filing, the Customs Court's promulgation of rule 3.2(b), which deems the date of mailing of a summons as the date of filing, is a proper exercise of the delegated authority.

No facts or legal principles have been presented in this case that were not considered in the *Fairfield* case, and that case is *stare decisis* and governs the issue in this case. For a full discussion of the reasons and authorities in support of the conclusion reached in the *Fairfield* case see the decision in that case.

Ordered that the summonses in the actions listed on the attached schedules "A" and "B" were timely filed, and the defendant's motion to dismiss and sever and dismiss is hereby denied.

(C.R.D. 76–13)

MOHAWK RECREATION PRODUCTS, INC. *v.* UNITED STATES

Opinion and Order on Defendant's Motion to Dismiss for Lack of Jurisdiction

Court No. 74–6–01524

Port of Champlain-Rouses Point

[Defendant's motion denied.]

Dated December 22, 1976

Sharretts, Paley, Carter & Blauvelt (*Patrick D. Gill* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*David R. Ostheimer*, trial attorney), for the defendant.

NEWMAN, Judge: Pursuant to rules 4.7(b)(1) and 4.12, defendant has moved to dismiss this civil action on the ground that plaintiff had no standing to file protest No. 0712–3–000550 under 19 U.S.C. § 1514 (1970), and therefore the court lacks jurisdiction under 28 U.S.C. § 1582 (1970). In opposition to defendant's motion, plaintiff has submitted a memorandum of law and two supporting affidavits.

I have concluded that plaintiff had the statutory right to file a protest. Accordingly, this court has jurisdiction and defendant's motion to dismiss is denied.

The pertinent statutory provisions read:

19 U.S.C. § 1514(b)(1) (1970):

> (b) * * *.
>
> (1) * * * protests may be filed by the importer, consignee, or any authorized agent of the person paying any charge or exaction * * *.

28 U.S.C. § 1582(c) (1970):

> (c) The Customs Court shall not have jurisdiction of an action unless (1) * * * a protest has been filed, as prescribed by section 514 [19 U.S.C. § 1514] of the Tariff Act of 1930, as amended, * * *.

1.

In 1972 plaintiff, then doing business as Hilts-Willard Glove Corporation for purposes of certain transactions, imported gloves through the port of Champlain-Rouses Point, New York. Entry No. 123020 of October 20, 1972 was made for plaintiff's account by A. N. Deringer, Inc., a licensed customs broker. The commercial and special customs invoices show that Hilts-Willard Glove Corporation was the actual purchaser and owner of the imported merchandise.

However, no owner's declaration or superseding bond was filed by Deringer in accordance with 19 U.S.C. § 1485(d) (1970) and 19 CFR § 8.18(d) (1970). In short, Deringer was the "nominal consignee" and importer of record, whereas Hilts-Willard Glove Corporation was the "ultimate consignee" and actual importer. Protest No. 0712-3-000550 dated December 17, 1973 and covering consumption entry No. 123020 was filed in plaintiff's name by its counsel, Sharretts Paley.

R. L. Bronson, an attorney-in-fact for A. N. Deringer, Inc., submitted a supporting affidavit executed on October 13, 1976, averring: on October 20, 1973 affiant made entry No. 123020 for plaintiff, then doing business as Hilts-Willard Glove Corporation (its name prior to a merger in early 1972); in entry No. 123020, Deringer was the importer of record and nominal consignee; the importationof gloves was ultimately consigned to plaintiff; there was no owner's declaration or superseding bond filed in connection with the entry; Deringer paid the duties, and in turn, was reimbursed for the payment by plaintiff; further, that "[w]e acknowledge that Mohawk Recreation Products, Inc. is the real party-in-interest and ultimate consignee in a commercial sense in all instances where we have acted as Customs brokers for Mohawk Recreation Products, Inc. or its predecessor Hilts-Willard Corp., irrespective of whether an owner's declaration or superseding bond was filed"; plaintiff acted as agent for Deringer in filing the protest, and Deringer has ratified plaintiff's action; "[a]t all times, A. N. Deringer, Inc. and Mohawk Recreation Products, Inc. have been in agreement as to the filing of this protest by Mohawk Recreation Products, Inc. through its attorneys, Sharretts, Paley, Carter and Blauvelt, P.C."; and that upon refund of any duties resulting from a successful prosecution of this action, Deringer would forward the refund to plaintiff.

Additionally, Thomas E. Haley, plaintiff's treasurer, submitted a supporting affidavit executed on October 5, 1976, stating that on January 31, 1972 Hilts-Willard Glove Corporation was merged with Mohawk Products, Inc. and became known as Mohawk Recreation Products, Inc.; after the merger plaintiff continued to do business as Hilts-Willard Glove Corporation in order to wind up transactions commenced prior to the merger; at the time of making entry No. 123020 plaintiff was still doing business under the name of Hilts-Willard Glove Corporation for purposes of that transaction; and that by virtue of the merger, plaintiff acquired all of the rights, liabilities and interests of Hilts-Willard Glove Corp.

2.

Defendant urges that this action be dismissed for lack of jurisdiction on the ground that Deringer, who made the entry, was the proper

party to file the protest. In the event this motion to dismiss should be denied, defendant "requests that its right to depose the affiants, Mr. Bronson and Mr. Haley, as to the matters contained in their affidavits, be preserved".

Plaintiff responds that it is a real party-in-interest inasmuch as it is the only party which stands to benefit from a recovery of excessive customs duties. Further, plaintiff contends that it filed the protest as agent of the importer of record, and that such filing has been ratified.

3.

The sole question for determination is whether plaintiff had the right to file a protest, either on its own behalf or as agent of the importer of record.

The courts have "consistently permitted" the actual owner and ultimate consignee of the imported goods to file protests on its own behalf. In this connection, the following pertinent observations by Judge Miller of our appellate court, concurring in *United States* v. *Wedemann & Godknecht, Inc., a/c Atwater Throwing Co.*, 62 CCPA 86, 93–94, C.A.D. 1151, 515 F. 2d 1145 (1975), are apposite:

> The courts have consistently permitted the owner-importer of the merchandise or his agent to protest the decision of the collector, even though such owner-importer or agent (or both) was not so identified in the entry papers, upon proof of identity at the trial. See *United States* v. *Hannevig*, 10 Ct. Cust. App. 124, T.D. 38384 (1920); *Adolco Trading Co.* v. *United States*, 71 Cust. Ct. 145, C.D. 4487 (1973); *Great Lakes Foundry Sand Co.* v. *United States*, 15 Cust. Ct. 256, Abs. 50442 (1945); *Bernstein* v. *United States*, 59 Treas. Dec. 870, T.D. 44800 (Cust. Ct. 1931); *Davies, Turner & Co.* v. *United States*, 58 Treas. Dec. 1216, Abs. 14407 (Cust. Ct. 1930); *Gray* v. *Lawrence*, 10 F. Cas. 1031 (No. 5,722) (C.C.S.D.N.Y. 1853). The import of these decisions is that, for purposes of section 514, a protest may be filed by one who proves that he is the real party in interest or his agent. Thus, in *Bernstein*, supra, the concurring opinion quoted the following portion of Chief Justice Taney's opinion in *Mason* v. *Kane*, 16 F. Cas. 1044 (No. 9,241) (C.C.D. Md. 1851):
>
> We see no inconvenience that can arise to the collector, or the public, by permitting the owner to maintain the suit in his own name, instead of suing in the name of his agent or consignee; the payment by the consignee, is the payment by the principal; and the protest of the consignee, the protest of the principal, if he thinks proper to adopt it. We think the practice in some of the circuits has sanctioned suits by the foreign owner, in cases of this description; and as this practice is consistent with a fair construction of the act of 1845, and no injustice or inconvenience can arise from it, the court are of opinion, that this objection must be overruled.

In *T. W. Holt & Company* v. *United States*, 28 Cust. Ct. 504, Abs. 56756 (1952), *aff'd*, 41 CCPA 8, C.A.D. 522 (1953), the plaintiff

moved to punish certain officials of the Bureau of Customs for contempt in not complying with a judgment of the Customs Court granting plaintiff's petition for remission of additional duties under section 489 of the Tariff Act of 1930 (92 Treas. Dec. 226, Abs. 54422 (1957)). The customs officials, who plaintiff sought to have held in contempt, allegedly refused to refund duties to plaintiff pursuant to the court's judgment. Ostensibly, the reason for withholding a refund from the plaintiff was that the entries were made in the name of a customhouse broker (Kenneth Kittleson), and the latter filed no owner's declaration pursuant to section 485(d) of the Tariff Act. Thus, according to the Bureau, any refunds found to be due were payable to Kittleson, the importer of record, rather than to plaintiff, the ultimate consignee.

In determining whether, in withholding a refund of duties from the plaintiff, the officials had committed contempt the court noted that pursuant to sections 483 and 485(d), the importer of record (Kittleson) was liable for payment of duties and therefore was the person entitled to recover them. Significantly, the court further held (28 Cust. Ct. at 507):

> Nevertheless, T. W. Holt & Company, as the *actual importer of the merchandise at bar*, had a right accorded by the provisions of rule 29, supra, to petition this court for the remission of the additional duties assessed by the collector. *Moreover, it is essential that such a right be extant for the protection of an importer against the possible defection of a disinterested, negligent, or bankrupt nominal consignee.* [Emphasis added.]

While section 489 was silent concerning who could file a petition for remission, rule 29 of the court then in effect provided that petitions must be signed and filed by the *importer, consignee, or agent.* Thus, the clear implication of the court's holding in *Holt* is that the ultimate consignee and actual owner of the goods may be deemed an importer or consignee for purposes of suing for a refund of duties.

Plainly, the rationale of *Holt*—that the right to petition was essential "for the protection of an importer against the possible defection of a disinterested, negligent, or bankrupt nominal consignee"—is applicable here to the right to file a protest.

Moreover, in determining that the customs offlcials had not committed contempt, the court emphasized that its judgment was "in no sense of the word either a money judgment or a specific direction to the United States or to the collector of customs to pay the refund determined to be due to the particular party plaintiff." Similarly, in classification cases the court does not enter a money judgment against the Government or issue a specific direction as to whom a refund that is due should be paid. Consequently, following the rationale in *Holt*, the nominal consignee's liability for duties and entitlement to

the payment of any refund do not foreclose a protest by the ultimate consignee and actual owner of the goods.

In *Control Data Corporation* v. *United States*, 61 CCPA 109, C.A.D. 1132, 499 F. 2d 1304 (1974), the appellate court upheld the jurisdiction of this court, notwithstanding that appeals for reappraisement were filed by the ultimate consignee (Control Data) rather than by the importer of record (Norman G. Jensen, Inc., a customs broker). Although the Government did not challenge the court's jurisdiction, the jurisdictional issue was raised in this court by Judge Richardson *sua sponte*. See *United States* v. *Control Data Corporation*, 69 Cust. Ct. 274, A.R.D. 310, 352 F. Supp. 1392 (1972).

See also my opinion in Hancock *Gross Mfg., Inc.* v. *United States*, 75 Cust. Ct. 188, C.R.D. 75–6, 400 F. Supp. 813 (1975), and the cases cited therein, wherein defendant's motion to dismiss the ultimate consignee's protest for lack of jurisdiction was denied.

While the line of authority discussed above clearly supports plaintiff's right to file a protest on its own behalf, nevertheless it appears that plaintiff heavily relies upon the Bronson affidavit, citing *Wedemann & Godknecht, supra*, and *Baylis Brothers Co., etc.* v. *United States*, 75 Cust. Ct. 89, C.D. 4611, 400 F. Supp. 940 (1975), as dispositive of the question of agency and ratification.

In challenging the factual and legal basis of the asserted agency relationship and ratification, defendant relies upon a number of non-customs cases enunciating principles of the law of agency. However, as may be noted from the following pertinent comments of Judge Rich of our appellate court in *Wedemann & Godknecht, we are not dealing here with technical questions of agency law, but rather with the proper naming of parties under a procedural statute* (62 CCPA at 91–92):

> * * * The only question that remains is whether there was clear error in the lower court's conclusion that appellee, in filing the protest, *acted as* the agent of the consignee. *While there is no evidence of specific appointment of Wedemann & Godknecht, Inc., to act as agent* of Allen Forwarding Co. in filing protests, it would have been a work of supererogation to have made such an appointment in view of the relationship of these customs brokers to each other and to the business of Farbenfabriken Bayer and its domestic customers. Those relationships were such as to reduce to an absurdity the strange statement in the Government's brief that "Wedemann & Godknecht, Inc., was a stranger to the entry transaction * * *." On the contrary, the facts demonstrate that Wedemann & Godknecht, Inc., was in the driver's seat throughout, selecting out-port brokers to represent it and its client, employing lawyers to file protests as necessary, and generally looking after the customs business of FFB. Allen Forwarding Co. did not have to appoint it to file protests as its agent because Wedemann & Godknecht, Inc., was making the

decisions, and when it filed the protests on the Philadelphia importations it must have done so as the agent of "the person paying such charge." *Although it did so without specific request or appointment, we think the "ratification" by Allen Forwarding Co. cleared up that question, both confirming the agency relationship within the meaning of section 514 and adopting the action taken as its own.*

We do not regard this as a technical question of agency law in the usual sense. Agency law as such is primarily concerned with contractual rights and liabilities, vicarious tort liabilities, etc.; what we are really concerned with here is customs law procedures, court pleadings, and the proper naming of parties in compliance with a procedural statute. The right at stake is the right to a judicial review, on which hangs the right to recover excess duty admittedly paid. In *Wilmington Shipping Co.* v. *United States*, 52 CCPA 76, 79, C.A.D. 861 (1965), we expressed approval of the proposition stated in *Lewis' Sutherland on Statutory Construction*, Sec. 717, that statutes giving the right of appeal are to be liberally construed in furtherance of justice. In *Eaton Mfg. Co.* v. *United States*, 60 CCPA 23, C.A.D. 1076, 469 F. 2d 109 (1972), in which the sufficiency of a protest filed pursuant to§ section 514 was involved, we said, 60 CCPA at 30, that "denial of jurisdiction for insufficiency of protest is a severe action which should be taken only sparingly" and construed the protest liberally. In spite of some uncertainty, we held it sufficient because it did not "impose any undue burden on the collector." In *Wells Fargo & Co.* v. *United States*, 7 Ct. Cust. Appls. 346, T.D. 36903 (1916), the predecessor of this court took a liberal view of the establishment of an agency relationship in the matter of filing a protest by Wells Fargo as a customhouse broker for an owner. The court said (p. 351-52):

> This is not a case which involves the binding force and effect of a contract made by an agent, but rather is a question of practice or procedure under a statute providing how an action may be instituted.

In light of these principles and precedents and on the particular facts of this case we find no error in the decision below. The record makes it clear that the Government was aware at all times that any refunds of excess duty paid were to go to Allen Forwarding Co., and thus did not suffer additional administrative burden from the manner in which these protests were filed. [Emphasis supplied in part.]

In *Baylis Brothers Co., etc.*, a customs broker (M. A. Graser-Rothe) entered merchandise for the account of the plaintiffs, the ultimate consignees. No owner's declaration or superseding bond was filed by the broker. Plaintiffs filed the protests, and the sole issue was whether the court lacked jurisdiction under section 514. In support of their authority to file the protests as agents for the broker, plaintiffs submitted an affidavit of the broker which reads substantially the same as the Bronson affidavit in the present case.

Citing *Wedemann & Godknecht*, and relying upon the broker's affidavit averring a ratification of the protests filed by plaintiffs, Judge Ford held that the protests were properly before the court,* stating (75 Cust. Ct. at 94):

> * * * Baylis Brothers Co., etc. in the instant case, are the actual importers who in fact, hired and directed the entry of the merchandise through thei. broker, M. A. Graser-Rothe. The affidavit of the broker in the instant case ratified the action of filing the protests as in the *Wedemann* case, *supra*.

Here, as in *Baylis*, the Bronson affidavit indicates that plaintiff filed the protest as an agent of Deringer, and that plaintiff's action in filing the protest was ratified by Deringer. *Cf. Pasco Terminals, Inc.* v. *United States*, 76 Cust. Ct. 204, C.D. 4658, 416 F. Supp. 1242 (1976) (*appeal pending*).

In summary, then, I find that under section 514 plaintiff had standing to file a protest, either on its own behalf, or if so advised, as an agent of the importer of record. On either basis, the court has jurisdiction. Accordingly, defendant's motion to dismiss is denied.

Since plaintiff relies upon its standing as an agent in filing the protest, defendant's right to depose the affiants, Bronson and Haley, as to the matters contained in their affidavits, shall be preserved, as defendant has requested.

(C.R.D. 76–14)

MARUBENI AMERICA CORP. *v.* UNITED STATES

Opinion and Order on Defendant's Motion to Dismiss

Court No. 74–10–02924

Port of New York

[Motion denied.]

(Dated December 28, 1976)

Barnes, Richardson & Colburn for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Glenn E. Harris* and *Mark K. Neville*, trial attorneys), for the defendant.

NEWMAN, Judge: Defendant has moved, pursuant to rules 4.7(b) and 4.12, to dismiss this action for lack of jurisdiction.

The action challenges the appraisement of certain merchandise covered by entries 290071 and 303376 which were liquidated on December 15, 1972. Protest No. 1001–3–004358 was filed in connec-

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*Since the appraisements were held to be void and the liquidations premature and void, the protests similarly were held prematurely filed and dismissed for appropriate administrative action.

tion therewith on March 15, 1973 and denied on April 26, 1974. The summons herein was filed on October 23, 1974.

Defendant apprises us, as the basis for its motion, that an earlier protest, No. 1001–3–004015, covering the same entries and also disputing the official appraisements, was filed on March 8, 1973 and denied on April 26, 1974. A separate civil action, designated Court No. 74–7–01781, was commenced with the filing of a summons on July 11, 1974.

Defendant contends that "[i]nsofar as plaintiff has filed two separate protests concerning the same class of merchandise contrary to the statutory scheme of 19 U.S.C. 1514(b) mandating one protest per class of merchandise, the second protest filed, No. 1001–3–004–358, is invalid and therefore this court does not have jurisdiction" over this action which encompasses that protest.*

Plaintiff has not opposed the motion to dismiss.

The court, noting the paucity of information in the memorandum accompanying defendant's motion to dismiss, has examined the files in both actions which disclose the following.

Protest No. 1001–3–004015, the subject of Court No. 74–7–01781, challenges the appraisement of the merchandise on both entries at the "invoice unit values plus an addition for currency revaluation, or any value higher than the exporter's invoice unit prices", less certain included nondutiable charges, and asserts that the proper dutiable values are the exporter's invoice unit prices, less the alleged nondutiable charges. The summons filed therein sets forth the same claim.

On August 5, 1976, Court No. 74–7–01781 and others were suspended, without objection by defendant, under rule 14.7, pending the final determination of *C.B.S. Imports Corporation* v. *United States*, Court No. 73–1–00020. The common issue of law alleged therein was—

> Whether an addition to the invoiced unit prices, for fluctuation of currency, may properly be made in determining export value under Section 402(b).

Protest No. 1001–3–004358 contests the appraisement of the merchandise based on the "importer's resale price plus an addition for currency revaluation" and makes the same claim as set forth in protest No. 1001–3–004015 respecting the correct dutiable values. The summons sets forth the same claim.

On October 5, 1976, plaintiff moved under rule 14.7 to suspend the instant action, No. 74–10–02924, and others under *Mitsui & Co.*

*Section 514(b)(1), Tariff Act of 1930, as amended by the Customs Administrative Act of 1970, provides that—

* * * Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. * * *

(*U.S.A.*), *Inc.* v. *United States*, Court No. R68/8333, stating that the common question of law therein is whether the—

> * * * transaction between the exporter and importer is a "sale" for purposes of Section 402(b), and whether the invoiced prices fairly reflect the value of the merchandise.

Defendant strenuously opposed plaintiff's motion to suspend on the ground that the *Mitsui* case raises different issues and requires different proofs. The government also noted in its memorandum that it was preparing a separate motion to dismiss Court No. 74–10–02924 on jurisdictional grounds, and that "this case ought not to be suspended until full consideration has been given to the jurisdictional question, even if the Court should find suspension otherwise appropriate".

However, on October 20, 1976 the court, per Judge Watson, granted the motion to suspend the enumerated actions.

It is noted that the instant motion to dismiss was filed the same day, October 20, 1976. Nevertheless, defendant failed to advise the court herein that a motion to suspend the case was pending, and *failed thereafter to inform this member of the court of the action taken on that motion directing the suspension.*

The suspension procedure in this court is not an idle gesture. And most certainly, Judge Watson's order is not an idle gesture. The purpose of rule 14.7, familiarity with which is presumed, is to facilitate the disposition of actions and dispense with further proceedings in cases which may never be tried. *Cf. H. H. Elder & Co. et al.* v. *United States*, 69 Cust. Ct. 344, C.R.D. 72–28 (1972). Should the test case under which actions are suspended be decided in favor of defendant, the actions may be abandoned; should the test case be decided in favor of plaintiff, and the merchandise in the suspended cases is similar in all material respects to that in the test case, the court may deem the decision controlling in the suspended cases. This practice frequently has, among other benefits, the salutary effect of avoiding the retrial of the same issues. Hence, the significant importance of "suspension" to the orderly disposition of cases in this forum cannot be overestimated.

The concept of "suspending" cases under a "test case" is a constructive tool which is unique to the United States Customs Court. Since many cases commonly appear on the court's dockets involving the same issue of law or fact, it is readily apparent that there must be available some procedural vehicle whereby litigants may be permitted to appropriately delay further proceedings until the final disposition of the test case.

Here, defendant, filed its motion to dismiss, and pursuant to rule 17(h) stated that the action was in the *Complaint File*. At this juncture, it must be noted that rule 17(h) provides:

> Papers filed after an action has been commenced shall identify, with respect to each action affected by the papers, the court file (specific reserve file, suspension file, or suspension disposition file) in which the action is listed; and, if the action has been assigned, the name of the judge to whom the action has been assigned or reassigned.

However, a check of the docket records in the Clerk's office reveals that in point of fact no complaint has been filed in this action, and on October 20, 1976 (the date on which defendant filed its motion to dismiss) this action was listed by the Clerk of the court in the *October 1974 Reserve File*. Consequently, it is clear that defendant's motion to dismiss erroneously identified the court file in which this action was listed by the Clerk of the court. Moreover, and of greater significance, is the fact the defendant failed to advise this member of the court that plaintiff had *previously* submitted a motion for suspension, which was then pending; and defendant also failed *thereafter* to call to this court's attention the fact that plaintiff's motion for suspension was granted by Judge Watson on October 20, 1976. Accordingly, there was a failure by defendant to disclose the fact there was a *pending* motion for suspension; and also a failure to disclose *thereafter* the vital suspended status of this case subsequent to the service of Judge Watson's order on October 21, 1976. In the instant motion to dismiss, I prefer to think, and believe, that defendant inadvertently overlooked specific references to the suspended status of this case.

In summary, "suspension" is a vital procedural tool to use—but not to abuse—particularly in the pre-trial period. And, of course, it is fundamentally essential for motion papers to contain specific references to a suspension status of a case.

Defendant's motion to dismiss is hereby denied; but without prejudice to its renewal upon stating all the relevant facts.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/176	Richardson, J. July 13, 1976	General Instrument Corporation	70/22708, etc.	Item 685.80 12.5% or 12% (capacitors) Item 687.60 12.5% or 11% (diodes) Item 685.20 9% (yokes) Item 685.20 9% (convergence box assemblies) Item 682.10 12.5% (I.F. transformers) Without allowance under item 807.00	As assessed, *supra*, with cost or value of U.S. fabricated components (items marked "B", "C", "J", "N", "P") deductible from full value of imported merchandise pursuant to item 807.00	General Instrument Corporation v. U.S. (C.A.D. 1106, items marked "B"); (C.D. 4470, (items marked marked "C"); (C.A.D. 1128, items marked "J") Agreed statement of facts (items marked "N", "P")	New York American goods returned; U.S. components of: capacitors ("B"); diodes ("C"); television deflector yokes "(J"); IF transformers ("N"); convergence box assemblies ("P")

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/177	Maletz, J. July 19, 1976	Volly Industries, Ltd.	75-12-03289	Item 735.20 10%	Item 734.20 5.5%	Coleco Industries, Inc. v. U.S. (C.D. 4605)	Champlain-Rouses Point (Ogdensburg) Coin-operated video games; game machines
P76/178	Newman, J. July 19, 1976	Ehrenreich Photo-Optical Ind., Inc.	75-11-03046	Item 711.88 11%	Item 722.75 4.5%	Judgment on the pleadings	New York Photometer Model SRM 101
P76/179	Ford, J. July 21, 1976	Hazan Mercantile Co., Inc.	74-1-00147	Item 706.60 20%	Item 774.60 11.5% or 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Shopping bags
P76/180	Newman, J. July 21, 1976	Dollar Trading Corporation	72-4-00854	Item 649.43 24% or 21%	Item 649.41 4.5% or 4%	Dollar Trading Corp. v. U.S. (C.D. 4628)	New York Rotary files and miniature burrs
P76/181	Watson, J. July 26, 1976	Lloyd's Electronics, Inc.	74-2-00416	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	Los Angeles Radio and tape player with cabinets
P76/182	Maletz, J. July 29, 1976	U.S. Hobbies, Inc.	67/23915, etc.	Item 737.90 24%, 28% or 35% Item 737.15 28% or 35%	Item 657.20 13%, 15% or 19%	Pacific Fast Mail v. U.S. (C.D. 4333)	San Francisco Parts of model railroad equipment designed and chiefly used by adult hobbyists
P76/183	Newman, J. July 29, 1976	New York Merchandise Co., Inc.	73-11-03054	Item 683.70 35%	Item 737.90 21%	Amico, Inc., etc. v. U.S. (C.D. 4494)	Los Angeles Halloween, pumpkin-head and skeleton flashlights, etc.

P76/184	Richardson, J. August 3, 1976	J. H. Phillips F. W. Myers & Co., Inc., et al.	67/1137, etc.	Item 657.50 18%	Items 620.32/911.-23 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Meteo, Inc. (C.A.D. 1163)	Champlain (Ogdensburg) Composite powder
P76/185	Maletz, J. August 3, 1976	Larami Corp. et al.	71-10-01284, etc.	Item 737.90 24%, 21% and 17.5%	Item 734.20 7%, 6% and 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	Philadelphia Pinball, bagatelle, basketelle games, etc.
P76/186	Watson, J. August 4, 1976	The American Import Co.	73-11-03041	Item 748.20 22%	Item 774.60 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic
P76/187	Maletz, J. August 4, 1976	Larami Corp. et al.	70/11574, etc.	Item 737.90 28% or 24%	Item 734.20 8% or 7%	Mego Corp. v. U.S. (C.A.D. 1137)	Philadelphia Bagatelle games, etc.
P76/188	Maletz, J. August 10, 1976	Kemtron Products Company	65/20369	Item 737.90 35%	Item 685.90 17.5%	Agreed statement of facts	San Francisco Switch machines for control of automatic switches on model railroad equipment
P76/189	Maletz, J. August 10, 1976	Specialty Industries, d/o Amtel, Inc.	73-1-00280	Item 737.90 21%	Item 734.20 6%	Mego Corp. v. U.S. (C.A.D. 1137)	New York; Boston Plastic pinball games, plastic bagatelle games, etc.
P76/190	Newman, J. August 10, 1976	Olympic International, Ltd.	73-9-02719, etc.	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Radio-phonograph combination; machines

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/191	Newman, J. August 11, 1976	Fedtro, Inc.	68/52472	Item 682.60 15%	Item 688.40 11.5%	Fedtro, Inc. v. U.S. (C.D. 4548)	New York Multi-purpose battery chargers
P76/192	Newman, J. August 11, 1976	National Silver Co.	68/53316, etc.	Item 927.62 40%	Item 650.57 22.5%	U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Flatware
P76/193	Re, J. August 18, 1976	Stahlwood Toy Mfg. Co., Inc.	74-5-01235	Item 737.90 17.5%	Item 737.55 10.5%	Judgment on the pleadings	New York "Snap blocks" and "play blocks", style nos. 326 and 123
P76/194	Ford, J. August 19, 1976	Morris Friedman & Co.	68/53752	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/195	Ford, J. August 19, 1976	Morris Friedman & Co.	72-6-01416, etc.	Item 653.37 13% or 11%	Item 653.35 7% or 6%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157; C.D. 4561, aff'd C.A.D. 1156)	Philadelphia Candlesticks, candleholders, etc.
P76/196	Ford, J. August 19, 1976	Israeli Art Craft Importing Co. et al.	70/41833, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	Philadelphia Candlesticks, candleholders, etc.
P76/197	Ford, J. August 25, 1976	American Express Co., a/c Handcraft Importing Co., et al.	69/10634, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1157 1156)	Los Angeles Candleholders, candlesticks, etc.

P76/198	Ford, J. August 25, 1976	Morris Friedman	69/5364, etc.	Item 653.37 17½%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	Philadelphia Candlesticks, candleholders, etc.; table, floor or portable indoor lamps, of brass.
P76/199	Ford J. August 25, 1976	Pacific Coast Commercial, Inc., et al.	72-5-00095, etc.	Item 653.37 13% or 11%	Item 653.35 7% or 6%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1157, 1156)	Los Angeles Candleholders, candlesticks, etc.
P76/200	Ford, J. August 25, 1976	Quon Quon Co.	71-8-00803, etc.	Item 653.37 13% or 11%	Item 653.35 7% or 6%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1157, 1156)	Los Angeles Candleholders, candlesticks, etc.
P76/201	Maletz, J. August 31, 1976	Stahlwood Toy Mfg. Co., Inc.	73-12-03321	Item 737.90 17.5%	Item 737.55 10%	Judgment on the pleadings	New York "Snap blocks" (style no. 326), "play blocks" (style no. 123) (entries 232222 and 401833)—(motion denied as to entry 252558)
P76/202	Landis, J. September 2, 1976	J. E. Bernard & Co., Inc.	68/55731, etc.	Item 684.70 15% or 13%	Item 709.50 12% or 10.5%	Knowles Electronics et al. v. U.S. (C.D. 4483)	Chicago Receivers
P76/203	Re, J. September 7, 1976	Coleco Industries, Inc.	76-2-00335	Item 735.20 10%	Item 734.20 5.5%	Agreed statement of facts	Champlain-Rouses Point (Ogdensburg) Bowl-a-Matic games and parts; competitive bowling game machine having mechanical controls for manipulating the action.
P76/204	Maletz, J. September 8, 1976	Stahlwood Toy Manufacturing Co., Inc.	71-10-01414	Item 737.90 21%	Item 737.55 12.5%	Agreed statement of facts	New York Alphabet blocks; building blocks, bricks and shapes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/205	Watson, J. September 9, 1976	Coleco Industries, Inc.	74-10-02910, etc.	Item 735.20 10%	Item 734.20 5.5%	Agreed statement of facts	Champlain-Rouses Point (Ogdensburg) Bowl-a-Matic games and parts; competitive bowling game machine having mechanical controls for manipulating the action
P76/206	Watson, J. September 9, 1976	Mobay Chemical Company et al.	74-2-00505, etc.	Item 405.25 9%+1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578)	San Francisco Desmocoll 400
P76/207	Watson, J. September 9, 1976	Westwood Import Co., Inc.	67/6144(B), etc.	Item 748.20 28%	Item 774.60 17%	Joseph Markovits, Inc. v. U.S. (C.D. 4306) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) Armbee Corporation et al. v. U.S. (C.D. 3278)	Los Angeles Artificial flowers, etc.; merchandise in c.v. of plastic
P76/208	Watson, J. September 14, 1976	Naftone, Inc.	69/7745, etc.	Item 405.52 18%+2.8¢ per lb.; 16%+2.5¢ per lb.; 14%+2.2¢ per lb.; 12.5%+1.9¢ per lb.	Item 494.60 5%, 4% or 3%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Desmocoll 400

P76/209	Boe, C.J. September 15, 1976	Gimbel Bros., Inc.	74-7-01883, etc.	Item 706.60 20%	Item 774.60 10% or 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York "Vinyl Shopping Bags" and "Plastic Shopping Bags"
P76/210	Watson, J. September 16, 1976	B. A. McKenzie & Co., Inc.	74-2-00327	Item 748.20 21%	Item 774.60 8.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185)	Tacoma (Seattle) Artificial flowers, etc.; articles of plastic
P76/211	Newman, J. September 22, 1976	Sandvik Steel, Inc.	70/13178, etc.	Item 657.20 17% or 13% (Items marked "A" and "B")	Item 609.84 7% or 6.5% (Items marked "A") Item 609.88 8% or 7.5% (items marked "B")	Sandvik Steel, Inc. v. U.S. (C.D. 4609) (items marked "A" and "B")	New York Shoe die knife steel, etc. (Items marked "A" and "B")
P76/212	Newman, J. September 27, 1976	Sandvik Steel, Inc.	70/13411, etc.	Item 657.20 17%, 15% or 13% (items marked "A" and "B")	Item 609.84 7% or 6.5% (items marked "A") Item 609.88 8% or 7.5% (items marked "B")	Sandvik Steel, Inc. v. U.S. (C.D. 4609) (items marked "A" and "B")	New York Shoe die knife steel, etc. (items marked "A" and "B")
P76/213	Newman, J. September 27, 1976	Sandvik Steel, Inc.	71-10-01430, etc.	Item 657.20 13%, 11% or 9.5% (items marked "A" and "B")	Item 609.84 6.5% (items marked "A") Item 609.88 7.5% (items marked "B")	Sandvik Steel, Inc. v. U.S. (C.D. 4609) (items marked "A" and "B")	New York Shoe die knife steel, etc. (items marked "A" and "B")

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/214	Watson, J. September 29, 1976	Deldan Design, Inc., et al.	66/51778, etc.	Item 748.20 28%, 26.5%, 25% or 23.5%	Item 774.60 17%, 15%, 13.5% or 11.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial fruits and vegetables of plastic
P76/215	Ford, J. September 30, 1976	WMF of America, Inc., et al.	74-7-02016, etc.	Item 653.37 9.5%	Item 653.35 5%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Brass candlesticks
P76/216	Watson, J. September 30, 1976	Sanyo Electric, Inc.	70-2-00340	Item 685.50 7.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	Los Angeles Combination article containing a tape player
P76/217	Richardson, J. October 12, 1976	Winter Wolff International Corp.	73-8-02160	Item 657.35 7.5% + 0.6¢ per lb.	Item 654.00 5%	Summary judgment	New York Brass closet flanges, 14 ozs.
P76/218	Watson, J. October 12, 1976	J. C. Penney Purchasing Corp.	68/10616	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunoid Trading Corporation et al. v. U.S. (C.D. 3279)	Norfolk Artificial flowers, etc.
P76/219	Richardson, J. October 13, 1976	General Instrument Corporation	71-8-00705, etc.	Item 685.80 12.5%, 12%, 11% or 10% (capacitors) Item 687.60 12.5%, 11%, 10% or 7% (diodes, transistors)	As assessed, *supra*, with cost or value, as shown on commercial invoices, of U.S. fabricated components (items marked	General Instrument Corporation v. U.S. (C.A.D. 1106, items marked "B"); (C.D. 4470, items marked "C"); (C.A.D. 1062, items marked "D"); (C.A.D. 1128, items marked "J"); (C.D. 4507, items marked "K")	New York American goods returned; U.S. components of capacitors ("B"), diodes ("C"), transistors ("D") color delay lines ("F"), television deflection yokes ("J"), flybacks ("K"), tuners ("M"), I.F. trans-

			Item 685.20 10%, 9%, 8% 7%, 6% or 5% (yokes, tuners, convergence box assemblies, certain flybacks, certain color delay lines) Item 682.10 or 682.05 12.5% (I.F. transformers, some flybacks) Item 682.00 12% (some color delay lines) Without allowances under item 807.00	"B", "C", "D", "F", "J", "K", "M", "N", "P") deductible from full value of imported merchandise pursuant to item 807.00	Agreed statement of facts (items marked "F", "M", "N", "P")	formers ("N"), convergence box assemblies ("P")
P76/220	Landis, J. October 18, 1976	Ataka America, Inc., et al.	74-5-01275, etc.	Item 708.71 22%, 21% and 20% Item 708.72 25%, 22% and 20% Item 708.73 31%, 27% and 22.5%	Item 708.80 21%, 18% or 15%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes
P76/221	Landis, J. October 18, 1976	Olympus Corp. of America	74-5-01884	Item 708.73 27% and 22.5%	Item 708.80 18% or 15%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes

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P76/222	Maletz, J. October 18, 1976	G. C. Murphy Co.	74-5-01282	Item 737.90 17.5%	Item 734.20 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	New York Bagatelle game
P76/223	Watson, J. October 19, 1976	Otto Reis & Co. et al.	74-3-00821, etc.	Item 748.20 21%	Item 774.60 8.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Seattle Plastic artificial flowers, etc.
P76/224	Newman, J. October 19, 1976	Prestigeline (Div. of Weiman Co., Inc.)	74-6-01620, etc.	Item 772.15 8.5% (items marked "A") Item 774.60 or 772.15 10% or 8.5% (items marked "B")	Item 688.40 6.5% or 5.5% (items marked "A" and "B")	Prestigeline (Div. of Weiman Co., Inc.) v. U.S. (C.D. 4618) (items marked "A") Agreed statement of facts (items marked "B")	New York Battery operated lamps (items marked "A") Electrical articles (items marked "B")
P76/225	Ford, J. October 20, 1976	Bloomingdales, a Div. of Fed. Dept. Stores, Inc.	70/16159, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	New York Candlesticks, candleholders, etc.
P76/226	Ford, J. October 20, 1976	Bloomingdale's, Div. of Fed. Dept. Stores, et al.	71-6-00441, etc.	Item 653.37 19%, 17%, 15%, 13%, 11% or 9.5%	Item 653.35 10.5%, 9%, 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	New York Candlesticks, candleholders, etc.
P76/227	Richardson, J. October 20, 1976	Paper Novelty Corp.	74-2-00515, etc.	Item 653.95 8.5%	Item 688.40 5.5%	U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	New York Tree top light sets

P76/228	Maletz, J. October 20, 1976	Larami Corp.	75-12-03310, etc.	Item 737.90 17.5%	Item 734.20 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	Philadelphia Pinball, bagatelle games, etc.
P76/229	Ford, J. October 21, 1976	B. Altman & Co. et al.	70/6278, etc.	Item 653.37 19%, 17%, 15%, 13%, 11% or 9.5%	Item 653.35 10.5%, 9%, 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	New York Candlesticks, candleholders, etc.
P76/230	Ford, J. October 21, 1976	J. T. Steeb & Co., Inc., et al.	73-4-01000, etc.	Item 692.35 6.5% or 5.5%	Item 692.30 Duty-free	Agreed statement of facts	Portland, Oreg. Tractors for agricultural use
P76/231	Landis, J. October 21, 1976	Hancock Gross, Inc.	65/14094, etc.	Item 774.60 17% Item 774.25 12.5%	Item 773.25 10%	U.S. v. Hancock Gross, Inc. (C.A.D. 1153)	Philadelphia Washers
P76/232	Landis, J. October 21, 1976	Hancock Gross, Inc.	75-8-02108, etc.	Item 680.22 11%	Item 773.25 5%	Hancock Gross, Inc. v. U.S. (C.D. 4555, aff'd C.A.D. 1153)	Philadelphia Washers of rubber or plastic
P76/233	Maletz, J. October 21, 1976	Larami Corp.	75-8-01933, etc.	Item 737.90 28%, 24%, 21% and 17.5%	Item 734.20 8%, 7%, 6% and 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	Philadelphia Pinball, bagatelle games, etc.
P76/234	Maletz, J. October 21, 1976	A. Van De Pol Import Co.	76-6-01535	Item 657.20 9.5%	Item 642.60 5%	Judgment on the pleadings	Mobile "Press Screen Wire Netting"
P76/235	Ford, J. October 27, 1976	The Akron	73-6-01375, etc.	Item 653.37 11% or 9.5%	Item 653.35 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Candleholders, candlesticks, etc.
P76/236	Ford, J. October 27, 1976	The American Import Co.	75-4-00804	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Diego Candleholders, candlesticks, etc.

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P76/237	Ford, J. October 27, 1976	W. J. Byrnes & Co., a/c Baltam Trading, Inc.	71-11-01880	Item 653.37 13%	Item 653.35 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Seattle Candleholders, candlesticks, etc.
P76/238	Ford, J. October 27, 1976	Bruce Duncan Co., Inc., a/c Hong Horizons, Inc., et al.	71-8-00885, etc.	Item 653.37 15%, 13%, 11% or 9.5%	Item 653.35 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Candleholders, candlesticks, etc.
P76/239	Ford, J. October 27, 1976	Hallmark Cards, Inc.	71-6-00464, etc.	Item 653.37 13%, 11% or 9.5%	Item 653.35 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Kansas City (St. Louis) Candleholders, candlesticks, etc.
P76/240	Ford, J. October 27, 1976	New York Merchandise Co., Inc.	70/31258	Item 653.37 15%	Item 653.35 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Portland, Oreg. Candleholders, candlesticks, etc.
P76/241	Maletz, J. October 27, 1976	General Instrument Corporation	73-6-01513, etc.	Item 682.05 12.5%	Item 685.25 11%, 10%, 8.5%, 7% or 6%	Agreed statement of facts	New York Combinations of transformers and capacitors (intermediate frequency filters)
P76/242	Ford, J. October 28, 1976	Associated Dry Goods Corp.	70/3398, etc.	Item 653.37 19%, 17%, 15%, 13%, 11% or 9.5%	Item 653.35 10.5%, 9%, 8%, 7% or 6.5%	Morris Friedman & Co. v. U.S. (C.D. 4561, aff'd C.A.D. 1156)	New York Candlesticks, candleholders, etc.
P76/243	Ford, J. October 28, 1976	Ross Products (Div. of NMS Ind., Inc.), et al.	71-10-01544, etc.	Item 653.37 17%, 15%, 13%, 11% or 9.5%	Item 653.35 9%, 8%, 7%, 6% or 5%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D 1157	New York Candlesticks, candleholders, etc.

P76/244	Maletz, J. October 28, 1976	New York Merchandise Co., Inc.	74-12-03531	Item 688.10 20% applied to appraised constructed value	Items 807.00/ 688.10 20% assessed against invoiced unit values (held constructed value) less costs of fabricated components which are products of U.S., packed	Agreed statement of facts	San Diego Christmas tree lighting sets
P76/245	Ford, J. November 3, 1976	Morris Friedman & Co.	72-1-00175	Item 653.37 13% or 11%	Item 653.35 7% or 6%	Morris Friedman & Co. v. U.S. (C.D. 4561, aff'd C.A.D. 1156; C.D. 4570, aff'd C.A.D. 1157)	Philadelphia Candleholders, candlesticks, etc.
P76/246	Ford, J. November 3, 1976	Morris Friedman & Co.	72-11-02435, etc.	Item 653.37 11%	Item 653.35 6%	Morris Friedman & Co. v. U.S. (C.D. 4561, aff'd C.A.D. 1156; C.D. 4570, aff'd C.A.D. 1157)	Philadelphia Candleholders, candlesticks, etc.
P76/247	Ford, J. November 3, 1976	Morris Friedman & Co. et al.	73-3-00716, etc.	Item 653.37 15%, 13%, 11% or 9.5%	Item 653.35 8%, 7%, 6% or 5%	Morris Friedman & Co. v. U.S. (C.D. 4561, aff'd C.A.D. 1156; C.D. 4570, aff'd C.A.D. 1157)	Philadelphia Candleholders, candlesticks, etc.
P76/248	Ford, J. November 3, 1976	Kreiss Corp.	72-5-00096	Item 653.37 13%	Item 653.35 7%	U.S. v. Morris Friedman & Co. (C.A.D's 1156, 1157)	San Diego Candleholders, candlesticks, etc.
P76/249	Watson, J. November 3, 1976	Sanyo Electric, Inc.	75-6-01474, etc.	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	Los Angeles Combination article containing a tape player

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P76/250	Ford, J. November 4, 1976	The American Import Co. et al.	69/31963, etc.	Item 653.37 17% or 15%	Item 653.35 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D's 1156, 1157)	San Diego Candleholders, candlesticks, etc.
P76/251	Ford, J. November 4, 1976	The American Import Co.	72-5-00994	Item 653.37 15%	Item 653.35 8%	U.S. v. Morris Friedman & Co. (C.A.D's 1156, 1157)	San Diego Candleholders, candlesticks, etc.
P76/252	Ford, J. November 4, 1976	Morris Friedman & Co.	68/53753, etc.	Item 653.37 17% Item 653.39 19%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/253	Malets, J. November 4, 1976	Binder Tool & Mold, Limited	76-2-00395	Item 737.90 17.5%	Item 688.40 5.5%	Agreed statement of facts	Detroit HO or smaller scale model locomotive chassis, with self-contained electric motors
P76/254	Malets, J. November 4, 1976	Columbus McKinnon Corp.	76-6-01527	Item 680.50 9.5%	Item 664.10 5%	Agreed statement of facts	Norfolk Lifting machinery containing pulleys, a braking system, and reduction gears
P76/255	Re, J. November 4, 1976	Thornton Glove Co., Inc.	73-4-00964, etc.	Item 705.85 or 705.35 15%	Item 735.05 7.5%	Agreed statement of facts	New York Gloves or mittens

P76/256	Ford, J. November 9, 1976	Morris Friedman & Co.	65/5878, etc.	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/257	Ford, J. November 9, 1976	Morris Friedman & Co.	69/41725, etc.	Item 653.37 17%, 15%, or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/258	Ford, J. November 9, 1976	Hallmark Cards, Incorporated	75-6-01629, etc.	Item 653.37 11% or 9.5%	Item 653.35 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Kansas City (St. Louis) Candlesticks, candleholders, etc.
P76/259	Malets, J. November 9, 1976	Great Lakes Wine Company	73-10-02902	Item 167.10 $1.36 per. gal.; and Int. Rev. taxes at $3.40 per gal.	Duties and Int. Rev. taxes improperly assessed on certain quantities of wine (8.0 gals., entry 117410; 7.3 gals., entry 110988; 2.4 gals., entry 113613) which never entered the U.S.	Agreed statement of facts	Chicago Sparkling wine
P76/260	Ford, J. November 10, 1976	B. Altman & Co., Inc., et al.	70/59353, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	New York Brass lamps, candleholders, etc.
P76/261	Ford, J. November 10, 1976	Morris Friedman & Co.	69/12837, etc.	Item 653.37 17% or 15%	Item 653.35 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.

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P76/262	Newman, J. November 10, 1976	Delmonico International Div. of Elgin National Industries, Inc.	73-7-01745	Item 685.30 6.5%	Item 678.50 5%	Summary judgment	New York Combination articles containing tape players (model Nos. 30S2158W (entry 477500) and 40AX18 (entry 118471))
P76/263	Ford, J. November 11, 1976	American Bravo Co.	68/68451, etc.	Item 653.37 17% or 13%	Item 653.35 9% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Candlesticks, candleholders, etc.
P76/264	Ford, J. November 11, 1976	Ford Motor Company	72-11-02259	Item 692.35 6.5% or 5.5%	Item 692.30 Free of duty	Agreed statement of facts	Detroit Tractor parts
P76/265	Ford, J. November 11, 1976	Morris Friedman & Co.	70/7161, etc.	Item 653.37 15% or 13%	Item 653.35 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/266	Ford, J. November 11, 1976	Hong Horizons, Inc., et al.	69/14864, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Candlesticks, candleholders, etc.
P76/267	Ford, J. November 11, 1976	Charles Sadek Import Co., Inc., et al.	68/38705, etc.	Item 653.37 17%	Item 653.35 9%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candlesticks, candleholders, etc.

P76/268	Ford, J. November 11, 1976	J. Sklar Mfg. Co., Inc.	68/59118	Item 709.27 36%	Item 832.00 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1129)	New York Surgical instruments; emergency war materials
P76/269	Watson, J. November 11, 1976	Brentwood Originals	68/49490, etc.	Item 366.60 38% Item 366.63 50% or 47.5%	Item 363.30 12.5% or 11.5%	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	San Diego Velveteen and corduroy covers for bolsters and bedrests
P76/270	Ford, J. November 18, 1976	Quon Quon Company et al.	69/53565, etc.	Item 653.37 17% or 15%	Item 653.35 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Candlesticks, candleholders, etc.
P76/271	Landis, J. November 18, 1976	National Silver Co. et al	66/44652, etc.	Item 533.31 or 533.33 10¢ per doz. pcs. +25% Item 533.37 10¢ per doz. pcs. +22%	Item 533.14 12.5% Item 533.16 6.25%	National Silver Co. v. U.S. (C.D. 2894) Enesco Imports, Inc. v. U.S. (C.D. 3423)	San Diego Ceramic products; Rockingham earthenware
P76/272	Newman, J. November 23, 1976	S. Hiller & Co., Inc., et al.	74-8-02236, etc.	Item 683.80 13.75%	Item 688.40 6.5% or 5.5%	The Ashflash Corporation v. U.S. (C.D. 4643)	New York Lanterns
P76/273	Ford, J. November 30, 1976	Amco Custom Brokerage Co.	67/79157	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/274	Maletz, J. November 30, 1976	Ken Kidder	65/16368	Item 737.90 35%	Item 737.07 16%	Pacific Fast Mail v. U.S. (C.D. 4333)	San Francisco HO-scale model railroad equipment

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/275	Newman, J. November 30, 1976	New York Merchandise Co., Inc.	74-5-01166	Item 688.10 20% applied to appraised constructed value	Items 807.00/ 688.10 20% assessed against invoiced unit values (held constructed value) less costs of fabricated components which are products of U.S., packed	Agreed statement of facts	San Francisco Christmas tree lighting sets
P76/276	Re, J. November 30, 1976	Eelco Mfg. Co., Inc.	75-2-00503, etc.	Item 705.86 35% Item 705.85 15%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	Los Angeles Gloves for use in motocross racing
P76/277	Landis, J. December 7, 1976	Rettinger Raincoat Mfg. Co., Inc.	65/668, etc.	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	New York Various synthetic rubber articles
P76/278	Re, J. December 7, 1976	David E. Porter a/c Torsten Hallman Racing, Inc.	72-4-00833	Item 705.50 25%	Item 735.05 9%	David E. Porter v. U.S. (C.D. 4641)	San Diego Gloves for use in sport of motocross racing

P76/279	Re, J. December 7, 1976	David E. Porter a/c Torsten Hallman Racing	73-7-01872	Item 705.50 25%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	San Diego Gloves for use in sport of motocross racing
P76/280	Re, J. December 7, 1976	J. T. Racing	75-8-02179	Item 705.50 25%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	San Diego Gloves for use in sport of motocross racing
P76/281	Re, J. December 8, 1976	Ambassador Division, Divina Footwear, Inc.	75-5-01241	Item 700.35 8.5%	Item 700.26 17¢ per pair	Agreed statement of facts	Los Angeles/Long Beach Men's leather work shoes
P76/282	Re, J. December 8, 1976	New York Merchandise Co., Inc.	72-12-02550	Item 705.85 15%	Item 735.05 9%	David E. Porter v. U.S. (C.D. 4641)	San Diego Gloves for use in sport of motocross racing
P76/283	Re, J. December 8, 1976	David E. Porter	71-8-00905	Item 705.50 25% Item 705.70 34%	Item 735.05 10%	David E. Porter v. U.S. (C.D. 4641)	San Diego Gloves for use in sport of motocross racing
P76/284	Re, J. December 8, 1976	David E. Porter a/c Med-International, David E. Porter a/c Torsten Hallman Racing, Inc.	72-9-01942	Item 705.50 25%	Item 735.05 9%	David E. Porter v. U.S. (C.D. 4641)	San Diego Gloves for use in sport of motocross racing
P76/285	Watson, J. December 15, 1976	Robert Bosch Corp.	75-1-00089	Item 685.50 7.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	San Francisco Radio-tape player combinations; model CR-4073 (MCR-7003-I.D.)
P76/286	Watson, J. December 21, 1976	United Silver & Cutlery Co.	74-10-02820	Item 650.15 2¢ each +12.5%	Item 650.21 0.5¢ each +8.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Steak knife sets

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/287	Newman, J. December 21, 1976	Hancock Gross, Inc. Davies Turner & Co.	69/14620	Item 657.35 1.275¢ per lb. +15%	Item 654.00 10%	Judgment on the pleadings	Philadelphia Brass water mixers 0171X, entries 22726 and 26148
P76/288	Ford, J. December 22, 1976	The May Dept. Stores Co. et al.	69/15633, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	New York Candlesticks, Candleholders, etc.
P76/289	Ford, J. December 22, 1976	Prepac, Inc.	73-12-03341	Item 706.60 20%	Item 774.60 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Articles in c.v. of plastics; tote bags
P76/290	Maletz, J. December 22, 1976	Stahlwood Toy Manufacturing Co., Inc.	67/83440, etc.	Item 737.90 35%, 31%, 28% or 24%	Item 737.55 21%, 18.5%, 16.5% or 14.5%	Agreed statement of facts	New York Alphabet blocks and building blocks, bricks, and shapes
P76/291	Re, J. December 22, 1976	Torsten Hallman Racing, Inc.	74-1-00095, etc.	Item 705.50 25%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	San Diego Gloves for use in sport of motocross racing
P76/292	Ford, J. December 29, 1976	Morris Friedman & Co.	65/5885, etc.	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/293	Ford, J. December 29, 1976	Morris Friedman & Co. et al.	74-11-03194, etc.	Item 653.37 11% or 9.5%	Item 653.35 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P76/294	Ford, J. December 29, 1976	May Dept. Stores Co.	68/23286	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	New York Candlesticks, candleholders, etc.

P76/295	Ford, J. December 29, 1976	The May Dept. Stores Co.	69/2376	Item 653.37 17% (items marked "A") Item 653.39 19% (items marked "B")	Item 653.35 9% (items marked "A") Appraisement and liquidation not in accordance with law; protest premature; entry ordered returned to regional commissioner for appropriate administrative action (items marked "B")	U.S. v. Morris Friedman & Co. (C.A.D. 1156) (items marked "A") Mobilite, Inc. v. U.S. (C.R.D. 73-11) (items marked "B")	New York Candlesticks, candleholders, etc. Table, floor or portable indoor lamps, of brass (items marked "A" under entry 819655) Lamps imported with electrical light bulbs; separate articles of commerce (items marked "B" under entry 786227)
P76/296	Ford, J. December 29, 1976	New York Merchandise Co., Inc.	71-8-00909, etc.	Item 653.37 13% or 9.5%	Item 653.35 7% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Portland, Oreg. Candlesticks, candleholders, etc.
P76/297	Landis, J. December 29, 1976	Hancock Gross, Inc	76-3-00582	Item 774.60 8.5%	Item 773.25 5%	Hancock Gross, Inc. v. U.S. (C.D. 4555, aff'd C.A.D. 1153)	Philadelphia Washers of rubber or plastic
P76/298	Watson, J. December 29, 1976	Nichimen Co., Inc.	74-11-03066, etc.	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York AM/FM/MPX stereo 8 track tape player with cutout without speakers, "JVC Nivico" brand models 4316 and 4385
P76/299	Maletz, J. December 29, 1976	Safdeye Dabah Int'l, Inc.	73-8-02237	Item 700.60 20%	Item 700.55 6%	Agreed statement of facts	New York Vinyl sandals (entry 254477)

ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/78	Richardson, J. July 13, 1976	Associated Custom House Brokers, a/c Michaels Stern Co.	R66/1082, etc.	Constructed value	Appraised values, less $0.36 per yard, net packed	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Rochester (Buffalo) "Cotton Elastic Webb", "Cotton Tissue", "Tissu coton avec elastique pour vetements", etc.
R76/79	Richardson, J. July 13, 1976	Great Empire Corp.	R67/7277, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed value," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Various model Volkswagen automobiles
R76/80	Richardson, J. July 14, 1976	Associated Custom House Brokers, a/c Michaels Stern Co.	R69/4921, etc.	Constructed value	Appraised values, less $0.36 per yard, net packed	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Rochester (Buffalo) "Cotton Elastic Webb", "Cotton Tissue", "Tissu coton avec elastique pour vetements", etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/81	Richardson, J. July 14, 1976	Associated Custom House Brokers, a/c Michaels Stern Co.	R69/4945, etc.	Constructed value	Appraised values, less $0.36 per yard, net packed	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Rochester (Buffalo) "Cotton Elastic Webb", "Cotton Tissue", "Tissu coton avec elastique pour vetements", etc.
R76/82	Richardson, J. July 14, 1976	Drexel Motors, Inc., et al.	R67/2416, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (In Deutsch Marks)," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles
R76/83	Richardson, J. July 14, 1976	F & D Trading Corp.	R66/11063	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Values (all in Deutsch Mark)," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Savannah Various model Volkswagen automobiles
R76/84	Richardson, J. July 14, 1976	Great Empire Corp.	R62/14585, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (In Deutsch Mark)," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Various model Volkswagen automobiles

R76/85	Richardson, J. July 14, 1976	Great Empire Corp.	R67/19114	Cost of production	3363.00 Deutsch Marks, for each automobile	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Charleston Model 113 Volkswagen automobile
R76/86	Richardson, J. July 14, 1976	Great Empire Corp.	R69/7766, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Various model Volkswagen automobiles
R76/87	Richardson, J. July 19, 1976	Drexel Motors, Inc.	R62/12278, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (In Deutsch Mark)," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles
R76/88	Richardson, J. July 19, 1976	Drexel Motors, Inc., et al.	R64/970, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (In Deutsch Mark)," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles
R76/89	Richardson, J. July 19, 1976	Drexel Motors, Inc.	R65/2, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (In Deutsch Mark)," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/90	Richardson, J. July 21, 1976	Drexel Motors, Inc.	R66/17943, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (In Deutsch Mark)," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles
R76/91	Richardson, J. July 21, 1976	F & D Trading Corp.	R66/2048, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (In Deutsch Mark)," for each automobile model	U.S v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles
R76/92	Newman, J. July 21, 1976	Mitsubishi International Corp.	R62/6624	American selling price	As shown on schedule B, attached to decision and judgment, for pattern number and sizes listed therein, on dates of exportation as shown, per pair, net packed	Agreed statement of facts	New York Footwear
R76/93	Ford, J. July 26, 1976	Northwest Calculating Equipment Co.	73-1-00046	Cost of production	Invoice unit values Protest No. 2904-2-001406 dismissed	Judgment on the pleadings	Portland, Oreg. Calculating machines

R76/94	Watson, J. July 29, 1976	Sandos, Inc.	R69/8813, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R76/95	Richardson, J. August 10, 1976	Associated Custom House Brokers, a/c Michaels Stern Co.	R69/12007, etc.	Constructed value	$1.10 per yard less $0.36, net packed	H.M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Rochester (Buffalo) "Cotton Elastic Webb", "Cotton Tissue", "Tissu coton avec elastique pour vetements", etc.
R76/96	Re, J. August 10, 1976	Page & Jones, Inc.	R61/15408	Cost of production	DM3420.17 each, net packed	Agreed statement of facts	Mobile Volkswagens

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/97	Ford, J. August 11, 1976	A. W. Fenton Co., Inc., et al.	R65/25130, etc.	Export value	At values adopted by appraiser less addition made by appraiser of 29.03%	Summary judgment The A. W. Fenton Co., Inc. v. U.S. (R.D. 11755, aff'd A.R.D. 313)	Cleveland Merchandise identified on schedule A, attached to order, under column headed "Reappraised Instruments"; non-sound measuring instruments
R76/98	Maletz, J. August 11, 1976	J. L. Wood	R69/200, etc.	Export value	Various invoice values less duty or other non-dutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, parts or accessories
R76/99	Re, J. August 18, 1976	A&A Trading Corp.	74-6-01519	Constructed value	Appraised values less amounts described as commission which were included in appraised values by customs	Judgment on the pleadings	Los Angeles Radios, some imported with earphones and batteries
R76/100	Re, J. August 19, 1976	A & A International	74-6-01518	Constructed value	Appraised values less amounts described as commission which were included in appraised values by customs	Judgment on the pleadings	Los Angeles Radios, some imported with earphones and batteries

R76/101	Maletz, J. September 7, 1976	H. A. & J. L. Wood	71-8-00935, etc.	Export value	Invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, parts or accessories
R76/102	Maletz, J. September 7, 1976	J. L. Wood	71-8-00934	Export value	Invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, parts or accessories
R76/103	Watson, J. September 8, 1976	Henry Pollak, Inc.	R61/20197, etc.	American selling price	Set forth under column "Unit Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R76/104	Richardson, J. September 14, 1976	All Nations Trading Co.	R63/16090, etc.	Cost of production	DM3340 (model 113); DM3429.65 (model 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Volkswagen automobiles
R76/105	Richardson, J. September 15, 1976	Ellis Goldin d/b/a Goldin Enterprises	R61/6576, etc.	Cost of production	As indicated on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Volkswagen automobiles
R76/106	Richardson, J. September 16, 1976	Harlo Expediters, Inc.	R66/5493	Cost of production	DM3339 (model 113); DM3430.27 (model 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Volkswagen automobiles
R76/107	Richardson, J. September 16, 1976	Snuffy Smith Motors, Inc.	R61/16486	Cost of production	DM3420.17 (model 113); DM3504.94 (model 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Americanized Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/108	Richardson, J. September 22, 1976	Patrick & Graves	R65/7719, etc.	Cost of production	DM3363.09	U.S. v. F & D Trading Corp. (C.A.D. 1039)	Houston Volkswagen automobiles (type 113)
R76/109	Ford, J. September 27, 1976	Ross Electronics Corp., Division of Interphoto Corp.	74-5-01333	Constructed value	As set forth under column heading "Constructed Value for Each Article, Net Packed" on schedule attached to decision and judgment	Judgment on the pleadings	Chicago Radio receiver sets, transistor radios, etc.
R76/110	Watson, J. September 29, 1976	Paris Associates, Inc.	73-11-03107	Export value	Invoiced unit prices, net, packed	Agreed statement of facts	Los Angeles Wigs
R76/111	Re, J. September 29, 1976	W. R. Grace & Co., Pac. Coast Div., et al.	R58/10383, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	San Diego Japanese plywood
R76/112	Newman, J. September 30, 1976	Willo-Peer, Division of Berkey Photo, Inc.	74-7-01831	Export value	Entered values	Judgment on the pleadings	New York Zoom cameras, model 618 super movie cameras

R76/113	Richardson, J. October 18, 1976	J. C. Cox, Inc.	R65/7370	Cost of production	DM3363.00	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R76/114	Richardson, J. October 19, 1976	Dixie Warehouse, Inc.	R62/3834	Cost of production	DM3339.00	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R76/115	Richardson, J. October 19, 1976	Patrick & Graves	R65/23719	Cost of production	DM3349.00 (type 113); DM3436.40 (type 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R76/116	Richardson, J. October 19, 1976	Patrick & Graves	R67/1389, etc.	Cost of production	At values specified in schedule attached to decision and judgment in column designated "Claimed Value"	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R76/117	Watson, J. October 27, 1976	Spiegel, Inc.	73-7-01893	Export value	Invoiced ex-factory prices plus amounts shown on each invoice for hauling and lighterage, cartage, insurance and petties	Agreed statement of facts	Chicago Wearing apparel
R76/118	Ford, J. October 28, 1976	J. L. Wood	72-2-00284, etc.	Export value	Various invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/119	Watson, J. October 28, 1976	Sandoz, Inc.	R70/1633, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R76/120	Ford, J. November 3, 1976	H. A. & J. L. Wood	74-7-01780	Export value	Various invoice values less duty or other non-dutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, etc.
R76/121	Watson, J. November 9, 1976	Sandos, Inc.	R66/5402, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs.	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/122	Watson, J. November 10, 1976	Sandoz, Inc.	R66/3661, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R76/123	Watson, J. November 10, 1976	Sandoz, Inc.	R69/11738, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R76/124	Boe, C.J. November 11, 1976	F & D Trading Corp.	R70/4376, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Values," for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Volkswagen automobiles

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/125	Newman, J. November 18, 1976	Lasco Rubber Co.	R61/19632, etc.	American selling price	As set forth on schedule, attached to decision and judgment, under the heading "Claimed Value Per Pair"	Agreed statement of facts	Norfolk Footwear
R76/126	Watson, J. November 29, 1976	Sandoz, Inc.	R67/8241, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R76/127	Watson, J. November 29, 1976	Sandos, Inc.	R68/362, etc.	United States value	U.S. selling prices, less 1% cash discount determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/128	Watson, J. November 30, 1976	Sandoz, Inc.	R68/7500, etc.	United States value	U.S. selling prices, less 1% cash discount determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R76/129	Watson, J. December 6, 1976	Sandoz, Inc.	R65/19619, etc.	United States value	U.S. selling prices, less 1% cash discount determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/130	Watson, J. December 6, 1976	Sandoz, Inc.	R68/8221, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement, divided by 1.38 or such other factor applied by customs officer, to allow for customs duties payable on imported dystuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R76/131	Richardson, J. December 29, 1976	H. W. Robinson Air Freight Corp., a/c Jaymar Ruby, Inc.	R64/21625, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C. D. 4388, aff'd C.A.D. 1138)	New York "Elastic weavings", "elastic webbing", etc.
R76/132	Richardson, J. December 29, 1976	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R68/17122, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Cotton elastic webbing", "elastic weavings", etc.
R76/133	Richardson, J December 29, 1976	H. M. Young Associates, Inc., et al.	74-3-00504, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Tapes Webbing" #7010 – 3¾", #7300 – 4", etc.

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CHENILLE STEMS
COVERED WIRE
Chenille stems composed of two strands of wire twisted around textile material in a manner which allows textile fibers to protrude held properly classifiable as other wire covered with textile material under item 642.97 of the Tariff Schedules of the United States.
Plaintiff's proof established that the use of chenille stems by florists to stem live flowers and fashion floral arrangements exceeded the use of hobbyists in making artificial flowers. Accordingly, plaintiff's claim was sustained. *Hub Floral Corporation*, C.D. 4669 21
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WIRE, COVERED (*see* CHENILLE STEMS, C.D. 4669).

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(*see* OPTICAL INSTRUMENTS, C.D. 4668).
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206.97 (*see* WOOD PRODUCTS, C.D. 4681).
207.00 (*see* WOOD PRODUCTS, C.D. 4681).
309.03 (*see* ELASTOMERIC FIBER, C.D. 4673).
309.06 (*see* ELASTOMERIC FIBER, C.D. 4673).
309.31 (*see* ELASTOMERIC FIBER, C.D. 4673).
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CRUDE SULPHUR (*see* MOTION FOR REHEARING, C.D. 4676).
ON SULPHUR (*see* MOTION FOR REHEARING, C.D. 4676).

ELASTOMERIC FIBER Page
MULTIFILAMENT YARN
Certain Sarlane elastomeric fiber was classified as a monofilament under item 309.03 or 309.06 of the Tariff Schedules of the United States, depending on the denier of the fiber, and was claimed to be classified as multifilaments, or grouped filaments under item 309.31 TSUS.
The court held that the exhibits and expert testimony indicated that the filaments of Sarlane had been fused or bonded together during the production process so as to constitute a monofilament, as classified. Plaintiff's claim for classification as multifilaments was therefore rejected. Accordingly, the claim was overruled.
Ameliotex, Inc., C.D. 4673 ---------- 72
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–10.
ELECTRICAL ARTICLES
AND ELECTRICAL PARTS OF ARTICLES, NOT SPECIALLY PROVIDED FOR; ARTICLES FOR MAKING CONNECTIONS TO OR IN ELECTRICAL CIRCUITS (*see* ELECTRICAL ARTICLES, C.D. 4667).
ARTICLES DESIGNED FOR USE IN AUDIO CIRCUITS (*see* ELECTRICAL ARTICLES, C.D. 4667).
CONNECTORS, SOCKETS, PLUGS
Certain electrical articles consisting of connectors, sockets and brackets were classified as parts of electrical switches, relays, and other electrical apparatus for making or breaking electrical circuits, under item 685.90, Tariff Schedules of the United States, and were claimed to be classified as electrical articles, and electrical parts of articles, not specially provided for, under item 688.40 TSUS. Plaintiff moved for summary judgment pursuant to Rule 8.2 of the Rules of the U.S. Customs Court and defendant cross-moved for summary judgment pursuant to said rule.
The court found based on the facts before it that the involved merchandise is more specifically provided for under item 685.90 TSUS because it is capable of use in power circuits. Accordingly, plaintiff's motion for summary judgment was denied and defendant's cross-motion for summary judgment was granted. *Inter-Maritime Forwarding Co., Inc.*, C.D. 4667 ---------- 7
Rehearing denied September 29, 1976.
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(*see* LADIES WEARING APPAREL, C.D. 4671).
WOODEN BARS AND GLASSWARE (*see* WOOD PRODUCTS, C.D. 4681).
FIBER GLASS
CHOPPED GLASS STRANDS (*see* PLASTIC PIPE FLANGES, C.D. 4679).
FIBROUS GLASS
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REINFORCED PLASTIC (*see* PLASTIC PIPE FLANGES, C.D. 4679).
FLEXIBLE WIRE TWISTED AROUND TEXTILE MATERIAL
PARTS OF ARTIFICIAL FLOWERS (*see* CHENILLE STEMS, C.D. 4669).
FLUORSPAR
CALCIUM FLOURIDE CONTENT
A certain shipment of fluorspar was classified under item 522.24, Tariff Schedules of the United States, as containing less than 97% calcium fluoride, and was claimed to be classifiable under item 522.21 TSUS, as containing more than 97% calcium fluoride.
The court found that the evidence offered by the plaintiff was more persuasive in being more definite as to the sampling method used, and in relying on the results of more than one testing method in three independent laboratories, and held that the merchandise was properly classifiable under item 522.21 of the Tariff Schedules as containing more than 97% calcium fluoride. Accordingly, the protests were sustained. *Associated Metals & Minerals Corp.*, C.D. 4677 ---------- 100
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–13.

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(*see* WOOD PRODUCTS, C.D. 4681).
WOODEN BARS (*see* WOOD PRODUCTS, C.D. 4681).
GROUPED FILAMENTS
MONOFILAMENTS (*see* ELASTOMERIC FIBER, C.D. 4673).
GUNSIGHTS (*see* OPTICAL INSTRUMENTS, C.D. 4668).
INHERENT DEFECT
REFUND (*see* INVISIBLE ZIPPERS, C.D. 4675).
INHERENTLY DEFECTIVE (*see* INVISIBLE ZIPPERS, C.D. 4675).
INVISIBLE ZIPPERS
DRAWBACK
Where certain invisible zippers were found inherently defective upon exportation, it was held that the importer was entitled to a refund of the duties paid as drawback under section 313(c) of the Tariff Act of 1930, as amended. Accordingly, plaintiff's claim for drawback was sustained. *Lansing Company, Inc.*, C.D. 4675 92
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77-11.
INHERENTLY DEFECTIVE (*see* INVISIBLE ZIPPERS, C.D. 4675).
JACKET, SWEATER AND PANTS SETS
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LABORATORY TESTS, CONFLICTING
CALCIUM FLORIDE CONTENT (*see* FLUORSPAR, C.D. 4677).
LACK OF JURISDICTION, MOTION TO DISMISS FOR
PROTESTS UNTIMELY FILED (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.D. 4683).
LADIES WEARING APPAREL
ENTIRETIES
Certain ladies wool knit and suede outfits consisting of jackets, shells (sweaters) and pants were classified as separate items, the jackets being classified under item 791.75 as wearing apparel of leather, while the woolen shells and pants were classified under item 382.58, as other women's wearing apparel, not ornamented, of wool, knit. Plaintiff claimed that the jacket, shell and pants were ladies pant suits and that the articles were properly classifiable as an entirety under item 791.75 as wearing apparel in chief value of leather.
On the record presented the court held that the imported sets were entireties for tariff purposes. However, plaintiff had established its claimed classification to only one of the two types of the imported suits having failed to establish that the component material of chief value of the other type was leather. Accordingly, the protests were sustained only in part. *J. C. Penney Purchasing Corporation*, C.D. 4671 48
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MOTION
FOR REHEARING
Dumping duties on sulphur (*see* MOTION FOR REHEARING, C.D. 4676).

MOTION—Continued Page

FOR REHEARING—Continued

Misapprehension of facts

Plaintiff moved for a rehearing of the decision of the court granting defendant's motion to dismiss this action contending that the court misapprehended the facts and that it was misinformed as to the particulars of the entry involving the shipment of crude sulphur.

The court held that plaintiff's supporting papers were rife with inconsistencies, raised new issues and generally confirmed its previously stated conclusion. Accordingly, the motion was denied. *Pasco Terminals, Inc.*, C.D. 4676 97

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77-8.

TO DISMISS FOR LACK OF JURISDICTION

Plaintiff not proper party

Defendant moved to dismiss the actions for lack of jurisdiction on the ground that they were not commenced by the party entitled to do so. The plaintiffs were the parties which made the entries, paid the duties and filed the protests.

The court held that the right of legal action against the United States to contest the denial of a protest and to obtain a refund of customs duties is not granted to a party lacking some direct connection to the customs transaction at issue and that no evidence has been offered to show this. Plaintiffs could not acquire the right of action solely by virtue of having purchased assets and choses in action. Accordingly, defendant's motion to dismiss was granted. *Parksmith Corp. et al.*, C.D. 4678 102

Rehearing motion denied January 27, 1977.

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77-15.

Protests untimely filed

Defendant moved to dismiss this action for lack of jurisdiction on the ground that the involved protests were untimely filed. Plaintiff had filed a protest against the classification of two entries which protest was approved after a two year interim. Acting under the impression that this protest was sufficient to protest its rights regarding later entries of the same merchandise, plaintiff did not protest these later entries until 90 days after the liquidation.

The court held that the timely protest filed related only to the entries referred to therein and had no prospective effect on later entries and that the protests at issue were filed beyond the time limit allowed by statute and therefore the court lacked jurisdiction. Accordingly, defendant's motion to dismiss was granted. *Micropoint, Inc*, C.D. 4682 133

Defendant moved to dismiss this action for lack of jurisdiction stating that the involved protests were filed after the period allowed by 19 U.S.C., section 1514(b)(2)(A). Plaintiff claimed that the said statute allows an initial protest to preserve the importer's rights with respect to later entries of the same merchandise.

The court held that the single timely protest referred only to the entries referred to therein and had no effect on later entries and that the involved entries were therefore untimely filed. Accordingly, defendant's motion to dismiss was granted. *Micropoint, Inc.*, C.D. 4683 135

TO DISMISS FOR LACK OF PROSECUTION

Actions not prosecuted with due diligence

Defendant moved to dismiss these actions for lack of prosecution on the ground that they were not being prosecuted with due diligence within the meaning of Rule 8.3(b)(4) of the Rules of the U.S. Customs Court. Plaintiff claimed there was good cause for the period of inactivity and cross-moved for summary judgment.

The court noted that there was a period of two to almost three years of inactivity by the plaintiff prior to its filing a consent to substitution of attorneys which was authorized two years previously. The court held that the existence of excess work arising from the October 1970 reserve calendar and the limitation of activity due to the dissolution of the law firm were not valid excuses for the long period of inactivity. Accordingly, defendant's motion to dismiss was granted and plaintiff's cross-motion for summary judgment was denied. *Rene D. Lyon Co., Inc.*, C.D. 4684 136

MOTION—Continued Page

TO SEVER AND DISMISS PROTESTS; SEPARATE PROTESTS INVOLVING THE SAME ENTRY

Pursuant to rules 4.7(b) and 4.12 of the Rules of the U.S. Customs Court, defendant moved for an order severing and dismissing this action as to three of the involved protests on the ground of lack of jurisdiction for plaintiff's failure to comply with 19 U.S.C., sec. 1514(b)(1) and 28 U.S.C., sec. 1582(c).

The court held that two of the three involved protests were improperly filed as they were not limited to one item of merchandise in the entry. Accordingly, the action was severed and dismissed as to those two protests and granted as to the third. *Minox Corporation d/o Berkey Photo, Inc.*, C.D. 4680 ---------- 110

MULTIFILAMENT YARN (*see* ELASTOMERIC FIBER, C.D. 4673).

NOT PILE FABRIC WITHIN MEANING OF TERM IN 346.15

CLOTH MUST BE COVERED IN PART BY A RAISED PILE PROJECTING FROM SURFACE, CUT OR UNCUT (*see* PILE FABRIC, C.D. 4670).

OPTICAL INSTRUMENTS

GUNSIGHTS

Certain tubular gunsights, each of which consists of an outer steel protective body and an inner tapered aluminum tube at one end of which is a glass lens and at the other an aperture and light-collecting system, were classified as other optical appliances and instruments under item 708.89 TSUS, and were claimed to be classified as other parts of rifles under item 730.67 TSUS and as other parts of shotguns under item 730.75 TSUS.

The court held that an "optical element" for tariff purposes consisted of lenses, prisms, mirrors or other articles which depend for their operation on the phenomena of light and vision and that based on the record the statutory criteria for classification of the imported gunsights as an optical instrument were fully met. Accordingly, plaintiff's claims were overruled. *Norman G. Jensen, Inc.*, C.D. 4668 ---------- 9

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PILE FABRIC

WOVEN COTTON FABRIC

Certain griege unbleached woven cotton fabric was classified as a velveteen pile fabric under item 346.15, Tariff Schedules of the United States. The importation was held not to be a pile fabric within the meaning of the heading governing item 346.15 and was therefore held properly classifiable under item 320.14, as claimed by plaintiff.

The court held that legislative history and lexicographic authorities establish that to constitute a pile fabric the cloth must be covered at least in part by a raised pile projecting from the surface which pile may be wholly or partly cut or uncut; that the merchandise in issue lacks the requisite raised pile formation and accordingly is not provided for in item 346.15, TSUS. *Tilton Textile Corp.*, C.D. 4670 ------ 27

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77-7.

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PLASTIC PIPE FLANGES

FIBROUS GLASS

Certain pipe flanges were classified under item 770.10, Tariff Schedules of the United States, as other articles not specially provided for, of reinforced plastics, and were claimed to be classifiable as articles, not specially provided for, of plastics under item 774.60 of the schedules.

The court held that the imported flanges were properly classifiable under item 770.10 TSUS on the basis that chopped fiber glass strands are of a form of fibrous glass material within the meaning of the tariff schedules. Accordingly, the protests were overruled. *John V. Carr & Son, Inc.*, C.D. 4679 ---------- 103

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WOOD SCREWS
Certain screws fully threaded composed of unhardened steel were classified as screws, other, under items 646.60 and 646.63, Tariff Schedules of the United States, and were claimed to be properly classifiable as wood screws under item 646.49 of the Tariff Schedules.
Based on the record presented and an examination of the exhibit, the court held that the imported screws are wood screws under item 646.49. Accordingly, plaintiff's claim was sustained. *David Komisar & Son, Inc., Daido Corp.* and *Karl Schroff & Associates, Inc.*, C.D. 4674... 88
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Certain wire rod coiling equipment was classified as "other" metal-working machine tools, under item 674.35, Tariff Schedules of the United States, and was claimed to be classifiable as machines, not specially provided for, and parts thereof, under item 678.50 of that statute.

WIRE—Continued Page
ROD COILING EQUIPMENT—Continued
The parties filed cross-motions for summary judgment pursuant to rule 8.2 of the Rules of the U.S. Customs Court.
The court found that the legislative history of headnote 1, subpart F, part 4, schedule 6, together with the meaning long ascribed to the term "machine tool" under prior tariff acts, rendered the involved pouring and laying reels properly dutiable as machines not specially provided for under item 678.50, as claimed by the plaintiff. Accordingly, the court granted plaintiff's motion for summary judgment. *Schmidt, Pritchard & Co., Inc.* and *Ferroquip Corp.*, C.D. 4666 1
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PRODUCTS; FURNITURE
Certain merchandise consisting of wine racks, and different types of wooden bars imported together and some with bar tools as well, was classified under different provisions of the tariff schedules, either as articles or other household utensils of wood, not specially provided for, or as boxes, cases or chests of wood. Plaintiff claimed the articles should have been classified as "furniture" under item 727.35 of the Tariff Schedules of the United States, and that the glassware, separately classified under items 546.52 and 546.54, should have been classified as entireties with the bars with which imported. Bars imported with bar tools as well as glassware, classified as "sets" under item 651.75 of the schedules, were claimed to be properly classifiable as entireties as boxes, cases, or chests of wood, or as separately dutiable articles.
On the record presented, the court held that the wine racks and the bars were not within the scope of the furniture provision of item 727.35 TSUS as the wine racks were not movable articles designed to be placed on the floor, and that the bars failed to meet the criterion that they be capable of being permanently fastened to the wall and not movable at will, and that the bars, glassware and tools were not classifiable as entireties since they retained their separate and distinct functions, and that the book and wonder bars, together with the glassware and tools, were properly classified as sets in item 651.75 TSUS, as they were designed to hold glassware and bar tools which items, though dissimilar, naturally complement one another in use. Accordingly, the plaintiff's claims were overruled. *Karoware, Inc.*, C.D. 4681 112
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FONDUE SETS — Page

ENTIRETIES

Certain fondue sets were classified as articles not specially provided for of a type used for household, table, or kitchen use, and the separate pieces were assessed under TSUS items 653.95 and 654.10 and were claimed to be classifiable as an entirety under item 653.50 TSUS.

The court found that there were triable fact questions raised by the defendant with respect to the identity of the pieces that make up the entirety and the extent to which the individual pieces are susceptible to a separate use. Accordingly, the motion for summary judgment was denied. *S. S. Kresge Co.*, C.R.D. 76–6 154

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TO CORRECT RECORDS OF CLERK; CROSS-MOTION TO SUSPEND ACTIONS

The clerk of the court received on January 30, 1976, by certified mail, summonses and filing fees in actions which were required to be filed by January 28, 1976. The envelope did not contain a postmark date. However, plaintiff's counsel by affidavit states that they were mailed by certified mail on January 28, 1976. Plaintiff moved to have a date of filing corrected to January 28, 1976 which was the 180th day after the denial of its protest. The defendant, while accepting January 28, 1976 as the date of the certified mailing, contended that the summons was not filed until physically received by the clerk on January 30, 1976 which was 182 days after the denial of plaintiff's protest and that the court was acting *ultra vires* when it adopted rule 3.2(b) of the rules. Defendant, furthermore, cross-moved to suspend the actions pending the final determination of *Gotham Knitting Mills, Inc.* v. *United States*, Customs Court No. 75–10–02525.

The court held that Congress by the adoption of 28 U.S.C.A., sec. 2632(a) delegated to the Customs Court authority to determine the manner of filing the summons, and that since mailing is recognized in statutes and decisions as a manner of filing, this court's promulgation of rule 3.2(b), which deems the date of mailing as the date of filing, is a proper exercise of the delegated authority and therefore granted plaintiff's motion to correct the clerk's record to establish January 28, 1976 as the date of filing of the summonses. The court further denied defendant's cross-motion to suspend the actions since in effect the defendant was seeking to suspend "motions" rather than "actions" and there is no provision in the statutes or rules for suspending one motion pending the final determination of another motion. *Fairfield Gloves et al.*, C.R.D. 76–10 166

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–6.

TO DISMISS

And sever and dismiss; date of mailing of summons held date of filing of summons

Defendant moved to dismiss and sever and dismiss these actions on the ground that the summonses were untimely filed. The court stated that this motion involved the same question as was involved in *Fairfield Gloves et al.* v. *United States*, 77 Cust. Ct. 166, C.R.D. 76–10, 10 Cust. Bul. No. 45, p. 50 (October 15, 1976) in which it

MOTION—Continued Page
To DISMISS—Continued
And sever and dismiss—Continued
held that the promulgation of rule 3.2(b) of the court determining the manner of filing the summons was a proper exercise of its delegated authority and that the summons may be deemed filed as of the date it is mailed.
The court held that since there were no facts or legal principles presented in this case that were not considered in the *Fairfield* case, that case is *stare decisis* of the issue in this one, and therefore denied defendant's motion to dismiss and sever and dismiss the actions. *Guy M. Barham Co. et al.*, C.R.D. 76–12 ---------- 179
For lack of jurisdiction
Plaintiff filed two separate protests concerning same class of merchandise
Pursuant to rules 4.7(b) and 4.12 of the Rules of the U.S. Customs Court, defendant moved to dismiss this action on the ground that plaintiff has filed two separate protests concerning the same class of merchandise contrary to 19 U.S.C. 1514(b) mandating one protest per class of merchandise, and therefore the second protest which is encompassed by this action is invalid and the court does not have jurisdiction of this action.
The court held that the instant motion was filed the same day that this court granted a motion to suspend this action, and that defendant had failed to disclose this fact and that it was essential for motion papers to contain specific references to the suspended status of a case. Accordingly, defendant's motion to dismiss was denied without prejudice to its renewal upon the stating of all the relevant facts. *Marubeni America Corp.*, C.R.D. 76–14 ---------- 186
Plaintiff not proper party
Pursuant to rules 4.7(b)(1) and 4.12 of the Rules of the U.S. Customs Court, defendant moved to dismiss this action on the ground that plaintiff had no standing to file the protest and therefore the court lacks jurisdiction.
On the record presented, the court held that plaintiff filed the protest as the agent of the importer of record and that such action was ratified by the owner of record, within the meaning of section 514 [19 U.S.C., sec. 1514] of the Tariff Act of 1930, as amended, and therefore the court has jurisdiction. Accordingly, defendant's motion to dismiss was denied. *Mohawk Recreation Products, Inc.*, C.R.D. 76–13 ---------- 180
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TO SET ASIDE COURT'S ORDER DISMISSING THE ACTION FOR LACK OF PROSECUTION; PLAINTIFF'S FAILURE TO COMPLY WITH RULES OF THE COURT
Plaintiff moved to set aside the court's order dismissing the action for lack of prosecution. Defendant opposed on the ground that plaintiff had failed to comply with rule 12.1(b) of the Rules of the U.S. Customs Court.
The court held that the plaintiff failed to indicate why the order of dismissal was improper and that plaintiff did not state any ground whatsoever for a rehearing. Accordingly, plaintiff's motion was denied. *Ed Alexander*, C.R.D. 76–8 ---------- 162
TO VACATE SANCTIONS; INTERROGATORIES NOT ANSWERED ADEQUATELY
Plaintiff moved to vacate sanctions imposed by the court pursuant to rule 6.5(b)(2) of the U.S. Customs Court predicated by its failure to comply with the court's order compelling discovery. The sanctions were made subject to vacatur if within 60 days of the order plaintiff served defendant with supplemental answers to certain interrogatories fully supplying the information requested. The plaintiff served the defendant within the 60-day period with supplementary answers and documentary exhibits and therefore moved to vacate the imposed sanctions. Defendant objected to vacatur stating that the answers were inadequate with respect to the interrogatories which seek to

MOTION—Continued
TO VACATE SANCTIONS—Continued
elicit the specific cost, expense and profit figures upon which plaintiff's claim is predicated. Plaintiff contended that the interrogatories requested that the figures be "described" and "located", but not "furnished".
The court ruled that a reasonable interpretation of the interrogatories required that plaintiff must disclose not merely an enumeration or description of the types of costs and expenses, but also the figures as well. It stated that plaintiff's multiple alternative value claims have opened the door to a wide breadth of discovery and that plaintiff's supplemental answers did not properly respond to the interrogatories. However, in view of the plaintiff's good faith efforts demonstrated by the plaintiff, the court granted an additional 60 days in which to furnish defendant with further supplementary answers disclosing the cost, expense and profit figures. *Gehrig, Hoban & Co., Inc.*, C.R.D. 76–11 176

MOTORCYCLE HELMETS
SUMMARY JUDGMENT, MOTION FOR
Certain motorcycle helmets were classified as manufactures wholly or in chief value of any product of which any resin or resin-like substance is the chief binding agent under paragraph 1539(b) of the Tariff Act of 1930, or as headwear of reinforced or laminated plastics in item 703.70 of the Tariff Schedules of the United States, and were claimed to be classifiable as wearing apparel of which leather is the component material of chief value under paragraph 1531 of the Tariff Act of 1930, or as headwear of leather in item 703.65 TSUS. Plaintiff moved for summary judgment pursuant to rule 8.2 of the Rules of the U.S. Customs Court.
The court found that the ex-parte affidavits presented by the plaintiff were substantially deficient as they relate to the issue of the costs of the component materials manufactured and shipped, and concluded that there exists a genuine issue of fact with respect thereto and therefore denied plaintiff's motion for summary judgment. *Beck Distributing Corp.*, C.R.D. 76–7 158

PLAINTIFF
FILED TWO SEPARATE PROTESTS CONCERNING SAME CLASS OF MERCHANDISE (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–14).
NOT PROPER PARTY (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–13).
VOLUNTARILY ABANDONED ACTION, THEREFORE THE CASE BECAME MOOT; DECISION HAS NO EFFECT WHEN CONTROVERSY CEASES TO EXIST (*see* MOTION TO CORRECT RECORDS OF CLERK, C.R.D. 76–10).
PLAINTIFF'S FAILURE TO COMPLY WITH RULES OF THE COURT (*see* MOTION TO SET ASIDE COURT'S ORDER DISMISSING THE ACTION FOR LACK OF PROSECUTION, C.R.D. 76–8).
PREVIOUS MOTION FOR SUSPENSION GRANTED (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–14).
PROPER
EXERCISE OF DELEGATED AUTHORITY; MANNER OF FILING SUMMONS (*see* MOTION TO DISMISS AND SEVER AND DISMISS, C.R.D. 76–12).
PARTY, PLAINTIFF NOT; DISMISSAL FOR LACK OF JURISDICTION, MOTION FOR (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–13).
PROTEST, AGENT OF IMPORTER
RIGHT TO FILE (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–13).
RADIO
BROADCASTING AND RECEPTION APPARATUS, AND PARTS, OTHER; CHASSIS, STEREO (*see* TRIABLE ISSUE, C.R.D. 76–5).
RECEIVER; TUNER AMPLIFIER (*see* TRIABLE ISSUE, C.R.D. 76–5).
RECEIVERS; JUDICIAL NOTICE (*see* TRIABLE ISSUE, C.R.D. 76–5).

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RIGHT TO FILE
PROTEST, AGENT OF IMPORTER (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–13).

RULES OF THE COURT WITH RESPECT TO MANNER OF FILING A SUMMONS HELD PROPER EXERCISE OF DELEGATED AUTHORITY (*see* MOTION TO CORRECT RECORDS OF CLERK, C.R.D. 76–10).

SOLID STATE (TUBELESS) RADIO RECEIVERS
STEREO CHASSIS (*see* TRIABLE ISSUE, C.R.D. 76–5).

STEREO CHASSIS
SOLID STATE (tubeless) radio receivers (*see* TRIABLE ISSUE, C.R.D. 76–5).

SUMMARY JUDGMENT
CROSS-MOTIONS FOR (*see* TRIABLE ISSUE, C.R.D. 76–5).
MOTION FOR
Cross-motion for permission for use of discovery procedures
Plaintiff moved for summary judgment pursuant to Rule 8.2 of the Rules of the U.S. Customs Court, claiming that certain watch timers imported from Switzerland and appraised on the basis of constructed value should properly be valued on the basis of export value. Defendant cross-moved to allow the use of discovery procedures authorized by the rules of the court. The court in denying both motions found that there is a genuine dispute between the parties with respect to relevant facts and furthermore that there is no good cause for allowing discovery procedures herein. *The American Greiner Electronic, Inc.*, C.R.D. 76–9 164
(*see* FONDUE SETS, C.R.D. 76–6).
(*see* MOTORCYCLE HELMETS, C.R.D. 76–7).

TIMERS, WATCH
VALUATION (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 76–9).

TRIABLE ISSUE
SUMMARY JUDGMENT, CROSS-MOTIONS FOR
A certain stereo "chassis" was classified under the provision in item 685.23, Tariff Schedules of the United States, for "Solid-state (tubeless) radio receivers," and was claimed to be classifiable as "Other" radio-broadcasting and reception apparatus, and parts thereof, under TSUS item 685.25. Plaintiff filed a motion for summary judgment, in support of which it submitted an affidavit of a witness who had testified in *Symphonic Electronics Corp.* v. *United States*, 72 Cust. Ct. 211, C.D. 4543 (1974), wherein the Government's assessment of duty under item 685.23 was sustained. Defendant filed a cross-motion for summary judgment, in support of which it incorporated the record in said *Symphonic* case, which case, defendant contended, was *stare decisis*.
On the record presented, the court held that triable issues existed concerning the essential components of a radio receiver, as that term is commonly understood in the electronics industry, and concerning whether a stereo "chassis" or tuner-amplifier of the type represented by the imported Model R860 is commonly regarded and sold in the trade as a "radio receiver." Accordingly, the cross-motions were denied. *Symphonic Electronics Corp.*, C.R.D. 76–5 147

TUNER AMPLIFIER
RADIO RECEIVER (*see* TRIABLE ISSUE, C.R.D. 76–5).

VALUATION
TIMERS, WATCH (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 76–9).
WATCH TIMERS (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 76–9).

WATCH TIMERS
VALUATION (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 76–9).

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AGENT OF IMPORTER (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–13).
CHASSIS (*see* TRIABLE ISSUE, C.R.D. 76–5).
COMMON MEANING (*see* MOTORCYCLE HELMETS, C.R.D. 76–7).
"FORM, MANNER AND STYLE" (*see* MOTION TO DISMISS AND SEVER AND DISMISS, C.R.D. 76–12).
LACK OF JURISDICTION (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–14).
REAL PARTY-IN-INTEREST (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–13).
RECEIVER (*see* TRIABLE ISSUE, C.R.D. 76–5).
SUSPENSION (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 76–14).
TUNER (*see* TRIABLE ISSUE, C.R.D. 76–5).
WEARING APPAREL (*see* MOTORCYCLE HELMETS, C.R.D. 76–7).

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